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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

BY RICHARD W. GILL,

CLERK OF THE COURT OF APPEALS,

AND

JOHN JOHNSON,

ATTORNEY AT LAW.

VOL. IX.

CONTAINING CASES IN 1837-8.

HERRICK & ALLEN

BALTIMORE:

JOHN D. TOY, PRINTER.

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ENTERED, according to the act of Congress, in the year one thousand eight hundred and forty, by RICHARD W. GILL and JOHN JOHNSON, in the Clerk's office of the District Court of Maryland.

NAMES OF THE JUDGES, &c.

DURING THE PERIOD COMPRISED IN THIS VOLUME.

OF THE COURT OF APPEALS.

Hon. JOHN BUCHANAN, Chief Judge.
Hon. JOHN STEPHEN, Judge.
Hon. STEVENSON ARCHER, Judge.
Hon. THOMAS BEALE DORSEY, Judge.
Hon. E. F. CHAMBERS, do.
Hon. ARA SPENCE, do.

OF THE COURT OF CHANCERY.

Hon. THEODORICK BLAND, Chancellor.

OF THE COUNTY COURTS.

FIRST JUDICIAL DISTRICT—*St. Mary's, Charles* and *Prince George's* counties.

Hon. JOHN STEPHEN, Chief Judge.
Hon. EDMUND KEY, Associate Judge.
Hon. CLEMENT DORSEY, do.

SECOND JUDICIAL DISTRICT—*Cecil, Kent, Queen Anne* and *Talbot* counties.

Hon. E. F. CHAMBERS, Chief Judge.
Hon. PHILEMON B. HOPPER, Associate Judge.
Hon. JOHN B. ECCLESTON, do.

THIRD JUDICIAL DISTRICT—*Calvert, Anne Arundel* and *Montgomery* counties.

Hon. THOMAS BEALE DORSEY, Chief Judge.
Hon. THOMAS H. WILKINSON, Associate Judge.
Hon. NICHOLAS BREWER, JR. do.

FOURTH JUDICIAL DISTRICT—*Caroline, Dorchester, Somerset* and *Worcester* counties.

Hon. ARA SPENCE, Chief Judge.
Hon. WILLIAM TINGLE, Associate Judge.
Hon. BRICE J. GOLDSBOROUGH, Associate Judge.

FIFTH JUDICIAL DISTRICT—*Frederick, Washington* and *Allegany* counties.

Hon. JOHN BUCHANAN, Chief Judge.
Hon. ABRAHAM SHRIVER, Associate Judge.
Hon. THOMAS BUCHANAN, do.

SIXTH JUDICIAL DISTRICT—*Baltimore* and *Harford* counties.

Hon. STEVENSON ARCHER, Chief Judge.
Hon. RICHARD B. MAGRUDER, Associate Judge.
Hon. JOHN PURVIANCE, do.

OF BALTIMORE CITY COURT.

Hon. NICHOLAS BRICE, Chief Judge.
Hon. ALEXANDER NISBET, Associate Judge.
Hon. W. G. D. WORTHINGTON, do.

ATTORNEY GENERAL.

JOSIAH BAYLEY, Esquire.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

MARYLAND.

December Term, 1837.

ANDREW SHRIVER *vs.* THE STATE OF MARYLAND *use of* CHARLES DEVILBISS.—*December*, 1837.

By the statute 9 and 10, *Wm.* 3d, *ch.* 15, which has been received and adopted in this state, the process of attachment to enforce awards, has been extended to all cases, whether the reference is of an action depending or not; provided, that when no suit is depending, it is stipulated in the agreement, that the submission shall be made a rule of court.

Whether the reference is by rule of court, or agreement out of the court, the power of the arbitrators depends upon the terms of the rule, or the language of the submission, and their proceedings in both cases are the same.

When a reference is made of a suit depending, the rule of the court recites and evidences the consent of the parties, and the terms of the submission, and is in general the only evidence of the agreement, which in such case need not be in writing.

In the case of a reference under the statute, the consent must be in writing, and proved in the mode prescribed; but in both cases, the power of the arbitrators depends upon the terms of their appointment, and their awards in each case will be enforced by attachment.

By the 8th section of the act of 1778, *ch.* 21, the courts are required to give judgment on awards made in causes instituted, or to be instituted, and to issue execution, as upon judgments on verdict, confession, or *non suit*, and the practice under this act has been to institute a suit, amicably or otherwise, and then by a rule of reference to name the arbitrators, the subjects of the submission, and the time, &c. within which the award is to be returned. This act is remedial, and should receive a liberal interpretation.

When an award is made and returned pursuant to the act of 1778, *ch.* 21, which the ordinary judgment of the common law courts may direct to be done, and to enforce, which the known executory writs of such courts are the appropriate process, such writs will be issued to enforce the judgment. But if the award should direct that to be done, to compel which, the ordinary writs would be inappropriate, the attachment must be resorted to, as before the act of 1778.

The act of 1778, has given the remedy by execution, when a cause is instituted, not by means of a previous verdict and judgment, but by directing that judgment shall be entered at once on the award, when returned and ratified as the act requires.

When a reference is made of a depending suit, the act of 1785, *ch.* 80, *sec.* 11, requires the case to be continued; but the omission to enter the continuances, is merely clerical, and this court can correct the error, without sending the record back to the county court.

When a time is limited for the completion of the award by the rule of reference, and the parties afterwards by agreement change the day, this court would hesitate to say, that either party could object, that the award was not made within the time first limited.

APPEAL from *Frederick* county court.

This was an action of *debt* commenced on the 19th February, 1831, on the testamentary bond of *Andrew Shriver*, to perform the office of executor of the last will and testament of *John Shultz*, late of *Baltimore* county, deceased. After an assignment of a breach, the parties agreed that the cases now depending between them, and all matters in dispute or unsettled between them, should be referred to *Gideon Bantz* and *Samuel Carmack*, with power to choose a third person in case of disagreement, to act in conjunction with them for their final decision of the same. The said matters in dispute to be referred and acted upon under the following terms, to wit: the said *Shriver* is to charge himself with all the proceeds of the estate of *John Shultz*, deceased, whose executor he is, in the same manner as if he had made a final settlement of said *Shultz's* estate, and had received all the money due and growing due to the same, subject to all legal and proper allowances. It is also to be admitted by said *Shriver* that *William Devilbiss*, one of the children of *Ann Maria Devilbiss*, deceased, is dead intestate, and that the said *Charles* is to receive his share of said *William's* part of said *Shultz's* estate, so far as he may be entitled to

the same as his brother, under an administration to be had upon said *William's* estate. Neither of said parties shall plead the statute of limitations to the claims of the other. It is also to be the right of the said parties, to appear before the said referees by their counsel, to examine the testimony and argue the case. This reference is to comprehend all unsettled matters of every description, whether arising or growing out of any immediate transactions between the said parties, or between either of said parties and any other person or persons, provided the other party has a *bona fide* interest therein and provided said claims do not arise since this reference. The said award to be signed by at least two of said referees, and to be made and ready to be delivered to said parties on or before the 1st June, 1832. The parties extended the time of making the award first, to 1st August, 1832, secondly, to 22d October, 1834.

And moved the court that the matters in controversy between them, as set out in said agreement, be referred accordingly, whereupon by consent of parties as set forth in said agreement, the same was ordered to be referred to *Gideon Bantz* and *Samuel Carmack*, and in case they disagree, they are to choose a third person, and that the said arbitrators or any two of them, when the whole matter concerning the premises between the said parties in variance being fairly adjusted, have their award in writing, under their hands and seals before the court here, with all convenient speed according to the terms of said agreement, and that judgment of the court be entered according to such award.

Afterwards the arbitrators returned the following award:

We, the subscribers, appointed referees by *Frederick* county court, in this case having given due notice to the parties of the time and place of hearing their respective allegations and proofs, and having heard and duly considered their said allegations, proofs, &c. do award and determine that the said *Andrew Shriver*, is indebted to the said *Charles Devilbiss*, the plaintiff, in manner and form as the said plaintiff hath declared against him; and we do further award and determine, that judgment for the plaintiff be entered in the

said cause for the debt and damages, in the declaration and costs, to be released on payment of the sum of $4,332 04, with interest from this date and costs until paid. This award to be considered as a full and final settlement of all claims now existing between the said parties, and all differences and disputes in relation to all claims which the said *Charles Devilbiss*, has against the said *Andrew Shriver*, as executor of the last will and testament of *John Shultz*, deceased, also on account of the partnership, in relation to the tan-yard carried on by the said *Charles*, and the said *Andrew*, also for the value of the improvements made by said *Charles*, on the property or farm which he owns, in common with the said *Andrew*, and for all other claims or demands of said *Charles* of every kind against the said *Andrew*, and also in full of all claims and demands of the said *Andrew* against the said *Charles*, for his store account, his mill account, his tan-yard account, his account for claims placed into the hands of said *Charles*, as constable, or otherwise, for collection, his claim for rents and profits on the farm which they hold as tenants in common, the bond of *Charles* assigned to said *Andrew*, and of all other claims and demands of every kind whatsoever, at this time, of the said *Andrew*, against the said *Charles* in his individual capacity, as also as administrator of his brother, *William Devilbiss*, deceased, the said *Andrew's* share, as assignee of *Samuel Devilbiss*, of said *William's* estate. And on the payment of the aforesaid sum of money by the said *Andrew* to the said *Charles* as hereby is awarded, the said parties shall each execute and deliver to the other, a receipt and release in full of all claims and demands up to this date, it being the object of this award finally to settle all disputes, claims and demands whatsoever, between the said parties. Given under our hand and seals, this twentieth day of October, 1834. GD'N BANTZ, [*seal.*]

Fred'k, Oct. 20, 1834. SAM'L CARMACK, [*seal.*]

Notice of the award being given to the defendant, and of a motion for a judgment upon it, the defendant filed in arrest of, the following reasons :

1. That the matters submitted to the decision of the arbitrators, were so submitted to them by said *Charles Devilbiss*, and *Andrew Shriver*, by their own immediate act and without any rule of court.

2. That the submission comprehended not merely the matters in issue, in the several suits then depending in this court, which are mentioned in the said submission, but various other matters then unsettled between them, not in issue, in said suits, and which are specified and mentioned in said submission.

3. That it was not only not a part of the submission, that the award should be returned to court, but it was the clear intention of the parties, that the suits in court should be at an end by the said submission, and that the award should be delivered to the parties themselves.

4. Because this court in giving judgment upon the case, upon the motion of the said state, at the instance of the said *Charles Devilbiss*, cannot fully execute the said award in all its parts, and the said *Andrew* suggests that by the said award he is required to pay a certain sum to the said *Charles Devilbiss*, and that said *Charles Devilbiss*, and he, the said *Andrew*, are to execute mutual releases.

The county court ruled the objections to be insufficient, and rendered judgment for the state, for the use of the equitable plaintiff, to be released in the payment of the sum mentioned in the award, with interest and costs. The defendant appealed to this court.

The cause came on to be argued before Stephen, Dorsey, Chambers, and Spence, Judges.

William Schley, for the appellant, contended:

1. That the cause was not referred within the meaning of the act of 1778, *ch.* 21, *sec.* 8, which applies only to cases instituted, and cannot be made to comprehend other matters than those involved in the suit. But this reference embraces various other matters, besides those so involved, and which

could have been adjudicated in the then depending controversy. The provisions of the act of 1785, *ch.* 80, *sec.* 11, demonstrates the propriety of this construction of the act of 1778. By the act of 1785, either party is authorized to move to reinstate the cause, if an award is not made in time, but of course when the cause is reinstated nothing is in controversy, or to be decided, but what was originally in litigation between the parties.

Suppose in this case, a motion had been made, and had prevailed to reinstate the cause; would all the extraneous matters submitted to, and decided by the referees have gone along with it, or, would not the county court have been confined to the matters originally in dispute?

The statute 9 and 10, *Wm.* 3d, *ch.* 15, is not in force in this state, but even under that statute, the *English* judges have never given judgments directly upon awards. If therefore the judgment in this case can be supported, it is under the *Maryland* law.

In *England* under the authority of the statute, parties may make any controversy a rule of court, whether there is a suit depending or not. 1 *Saund. Rep.* 327, *ante* (*c.*) 2 *Chitty Pr.* 79. *Nichols vs. Chalie*, 14 *Ves.* 267. 11 *Law. Lib.* 1. By the common law, nothing but a cause pending could be so referred, and the *English* statute not being in force here, the complex reference made in this case, could not be made a rule of court. *West vs. Stigar*, 4 *Har. and McHen.* 490. By the act of 1778, the courts are to give judgment on the award, as in case of verdict, or confession, and therefore the judgment must be confined to the points involved in the pleadings, because there could be no verdict upon, or confession embracing other points.

2. But even if it can be considered as a reference of the cause, within the meaning of that act, still the cause was not referred by rule of court, within the meaning of said act.

3. That at all events *the rule*, if any, is not in conformity with the agreement of the parties; and the cause by the terms, and manner of reference is discontinued.

The original agreement, was that the award should be made and delivered to the parties, by the 1st June, 1832, but the rule extends the time to the October term, 1834, being the 28th day of the month. This was six days later than the 22d, the latest period to which the time was extended by the agreement of the parties. But the rule differs from the agreement in another respect. The latter requires the award to be delivered to the parties, whilst the former directs it to be returned to the court. Under the agreement the arbitrators might have returned the award to October term, 1832, whilst by the rule the parties were discharged until October term, 1834.

The giving day from October term, 1832, to October term, 1834, was a discontinuance of the cause.

Here it appears, that the cause was continued from 1832 to 1834, thus passing over several intervening terms, not by misprision of the clerk, but by the order of the court, and consequently the defect is not amendable here. The act of 1809, applies to the case of a verdict, or cases in which the pleadings may be amended when the amendments are omitted in the county court. But the defect here complained of is incurable; because the error is not in the record, but in the proceedings of the court itself. Amendments are allowable, when the record does not conform to the truth of the cause, but are never made, when the record as it stands speaks the truth, and the amendment would be a departure from it. That a neglect to enter the continuances, works a discontinuance of the action is clear. 1787, *ch.* 9, *sec.* 6. *Munnikuyson vs. Dorsett*, 2 *Har. and Gill*, 374. Prior to the act of 1785, *ch.* 80, the mere reference of a cause was a discontinuance. *Camp and another, adm'rs of Clark vs. Root*, 18 *John.* 22. *The People vs. The Onondaga Common Pleas*, 1 *Wend.* 314. *Larkin vs. Robbins*, 2 *Ib.* 506. *Bean vs. Parker and French*, 17 *Massa.* 591. *Tillard's lessee vs. Fisher*, 3 *Har. and McHenry*, 118.

4. The time limited for making the award had elapsed before it was made. It is true, it was enlarged by consent

of the parties, but no action of the court was moved for, or had for the enlargement of the time. When the parties agreed to enlarge the time, the court should have been consulted, and shaped their rule accordingly. The award which was made in conformity with this new agreement, was not made under the rule of court. *Hall vs. Hall*, 3 *Con. Rep.* 308. If the rule allowed until October, 1834, it was not warranted by the original agreement, upon which it was founded, and was for that reason void. 2 *Tidd.* 876. *Watson on Arb.* 86. *Mott vs. Anthony*, 5 *Mass.* 489. *Owen vs. Hurd*, 2 *Durnf and East.* 643. If the rule did not give until October, 1834, but the postponement until that time, rested upon the agreement of parties made subsequently thereto, then the award for that reason is void. An action cannot be maintained on an arbitration bond, when the time is enlarged by the parties. *Freeman vs. Adams*, 9 *John.* 115. 3 *Term Rep.* 592, (*note.*) These objections are open upon the present appeal. *Munnikuyson vs. Dorsett*, 2 *Har. and Gill*, 374. *State use Charlotte Hall School vs. Greenwell*, 4 *Gill and John.* 407. *Sasscer vs. Walker's executors*, 5 *Ib.* 102.

5. But the award is ineffectual for another reason. It directs that to be done, which the judgment of the court cannot effect. How can the court, by its judgment, compel the parties to execute mutual releases? This can only be done by attachment, which issues upon the ground of contempt, for disobeying the rule of the court. In *England*, after a reference, by rule of court, the cause is gone, and the courts afterwards interfere only because of their rule, the non-observance of which is considered a contempt. This is always the case, unless a verdict is previously taken to secure the award, and then the cause is retained.

F. A. Schley and Dixon, for the appellee.

The act of 1825, *ch.* 103, does not permit the appellant to raise any points in this court, other than those which were raised in the county court.

The first objection then is, that the reference was of matters besides those which were comprehended in the suit referred. But the parties have an undoubted right to prescribe the terms of the submission, and having done so, and got the court to adopt them, they cannot now object to the award, because of those very terms. 2 *Chitty General Pr.* 86, 88.

At the common law, and prior to the *Statute of William*, it was competent to parties to refer, by rule of court, other questions of dispute than those involved in the legal controversy. 2 *Tidd.* 872, 875, 876. 11 *Law Lib.* 2. In this respect the statute was only declaratory of the common law. *Manser Weaver and another*, 23 *Eng. Com. Law Rep.* 73. 1 *Strange*, 695.

The reference under the statute must be in writing, which must stipulate, that the submission shall be by rule of court; and such reference will extend to other questions than those embraced in the suit. *Lucas, ex'r Dem. Markam vs. Wilson*, 2 *Burr*, 701. The only effect of the *Statute of William*, was to place controversies out of court upon the same footing as those in court, and it is a mistake to suppose, that this statute is not in force here. This being the case, it is no valid objection, that the reference carried with it questions of difference not involved in the legal controversy. The agreement is to be regarded, as incorporated in the rule, which was based upon it, and the parties now can urge no objection in opposition to their own agreement. *Cromwell vs. Owings*, 6 *Har. and John.* 16. 6 *Com. Dig. Arb.* 1. *Craven vs. Craven*, 2 *Serg. and Low.* 243. *Pearse vs. Cameron*, 1 *Maul. and Sel.* 675. 2 *Term Rep.* 646. *Yates vs. Russel*, 17 *John.* 461. *Camp vs. Root*, 18 *Ib.* 22. 1 *Coxe Rep.* 71. The act of 1778, *ch.* 21, *sec.* 8, made no change in the pre-existing practice in regard to references, by rule of court, except to entitle a party to a judgment on the award, as upon verdict, and consequently as before the act, such references are not confined to the matters in issue in the cases depending. Nor does a reference of a pending suit operate

a discontinuance; for the act of 1785, *ch.* 80, provides for the continuance of the cause, and for the refusal, or death of the arbitrators, or their omission to return their award within the period limited for that purpose. In deciding the cause in 3 *Har. and McHenry*, 118, this act was not referred to, and in 2 *Gill and John.* 482, the court says the 11th section of the act is positive, that the cause shall be continued.

The direction, that reciprocal releases shall be executed by the parties, does not vitiate the award, because that portion of it may be enforced by attachment, but even if it could not the whole award is not, on that account, void.

There is nothing in the objection urged now for the first time, founded upon the agreement of the parties to enlarge the time for making the award, for as there is nothing in the record to show *when* such agreement was made, the court may, and ought to presume, that it was made before the rule of court, and the whole of the agreement, embracing the stipulation to extend the time, is to be considered as constituting a portion of the rule.

But it was perfectly competent to the parties to enlarge the time without the order of the court. *The King*, (in aid of *Mytton*,) *vs. Hill, et al*, 3 *Eng. Exc. Rep.* 249. 9 *Law Lib.* 43. *Evans vs. Thomson*, 5 *East.* 189. *Brewer vs. Kingsly*, 1 *John. Cases*, 334. The objection which rests upon the omission to enter continuances cannot prevail, because the parties having agreed, and the rule of the court directed, that the award might be returned to October term, 1834, there could be no necessity for the appearance of the parties during the interval, and the continuance of the cause from term to term. *Cromwell vs. Owings*, 6 *Har. and John.* But even if such continuances ought regularly to have been entered, it is in the power of this court now to order them, under the act of 1809, *ch.* 153, *sec.* 3. 1 *Tidd. Pr.* 183. 2 *Tidd.* 733, 960.

CHAMBERS, Judge, delivered the opinion of the court.

We think the appellant has not successfully maintained the proposition, that this case is not within the act of 1778, *ch.* 21.

Submissions to award, both by rule of court, where an action was depending, and by agreement without suit, are familiar to the law since its earliest history.

After the process of attachment became the usual means of enforcing the execution of the award, when made under a rule of court, its advantages could not fail to be perceived, over the tedious and less certain mode of suing upon the award, or the contract of reference.

But this advantage did not consist in any enlarged powers given to the arbitrators, or to any more convenient system of proceeding by them, under the rule of court.

Their powers were exactly defined in all cases, by the language of their appointment, whether that language was found in the rule of court, or in the contract for the submission entered into out of court, and in both cases their proceedings were the same.

The reason is expressly given in the *Statute of* 9 and 10, *Wm. III. ch.* 15, because the parties become thereby obliged to submit to the award, *under the penalty of imprisonment* for their *contempt.*

By this statute, which we hold was received and adopted here, the benefit of the summary and effectual process of attachment to enforce awards, was extended to all cases, in which, by inserting such a provision in the agreement, the submission was made a rule of court, without the usual formalities of a suit.

In the suit pending, the rule of court recites and evidences the consent of parties, and the terms of submission, and is in general, the only evidence of the agreement, which, in such case, need not be in writing.

In the case of a reference under the statute, the consent must be in writing, and proved in the mode prescribed, but in both cases the power and authority of the arbitrators, are

equally dependent on the terms by which they are appointed, and in each case, the court will enforce the award by attachment.

Besides the remedies above noticed the courts had adopted a practice of taking a verdict, by consent, for a nominal sum, larger in amount than the award was expected to be, which, by agreement, was to stand as a security till the award should be returned, when a judgment was entered for the sum found due by the award, and for that reduced amount the ordinary process of execution was issued.

In addition to the cost, and the difficulty of this mode of proceeding, it was confined to such cases as involved the payment of money, it did not avail where the defendant was entitled to recover of the plaintiff, nor could the judgment be for a larger sum than the award. For these reasons it does not appear to have been a proceeding often adopted.

Thus stood the law when the act of 1778, *ch.* 21, passed, by the 8th section of which, the courts were required to give judgment on the award, in any cause instituted, or to be instituted, and to issue execution as they might do upon verdict, confession, or non-suit.

So far as we are informed, the uniform practice under this law has been to institute a suit adversely, or docket an action amicably, and then by a rule of reference name the persons selected as arbitrators, define the subjects intended to be submitted, and limit the time within which the award is to be returned, the notice to be given to the parties, and every other matter connected with their proceedings.

It is not required of us now to say, whether an agreement in *pais*, under the *Statute of William*, and made a rule of reference, as directed by that statute, would be a cause instituted in the court, in which the agreement was made a rule.

We will say, we regard the act of 1778 as a remedial law, designed to facilitate the administration of justice, and entitled to a liberal interpretation.

In the case before us, the cause had been instituted in the usual way by writ, the arbitrators named, and the extent of

their authority defined. The question then as to what were proper subjects of reference, is to be determined by the principles of common law, and not by the *Statute of William*, or the act of 1778. We think the cases referred to in the argument abundantly prove, that all matters of litigation, whether of law or of equity jurisdiction, whether claims for specific articles of property, real, personal, or mixed, or sums of money; whether such claims be by the party, who, in the suit pending, or in the case to be made a rule of court by written agreement, may be plaintiff or defendant, can be the subjects of reference, and when the award is made and returned to court, pursuant to the act of 1778, a judgment thereon is by that act required.

If the award be returned in a common law court, and directs that to be done, which by the ordinary terms of judgment of common law courts may be directed, and to enforce which, therefore, the known executory writs will be the appropriate process, such writs will be issued to execute the judgment.

Thus if the award directs payment of money, the delivering over of the possession of lands, or the restoration of a chattel, the writs of *fieri facias*, *habro facias possessionem*, or *retorno habendo*, might be an adequate and proper means of enforcing the judgment on that award, and the judgment must be in favour of the party entitled, whether plaintiff or defendant. If the award should direct a matter, for the enforcement of which the usual writs of execution will not avail, such as the execution of an instrument of writing, then, from the necessity of the case, the attachment must be resorted to, as before the act of 1778.

There would seem to be no other means whereby the manifest objects of the statutes can be effected. It is conceded, and cannot be denied that, parties may by mutual bonds of submission select arbitrators, and refer to them any, and all matters of controversy, legal and equitable, of law or of fact, for property, real, personal, or mixed, and that these arbitrators may award finally on all these matters,

either for the one party or the other. To execute such an award, the slow process of suit upon the bond was to be resorted to, and in that suit, the parties were not in all respects precluded from going into a history of the proceedings of the referees, to show a defect in the award, or an irregularity in the conduct of the referees; and a judgment for damages was finally obtained, instead of a specific performance. The attachment, once confined to the case of the suit pending, was most assuredly extended by the statute of *William*, to all cases where the parties chose to apply to the courts to afford the aid of this process, by making their agreement a rule of court.

The act of 1778, has extended the remedy of execution to all causes instituted, not by means of a previous verdict and judgment, but by requiring judgment to be entered without any preliminary, on all awards, when returned and ratified as by that act is provided, and without lessening the authority of the referees, or limiting the range and extent of their powers, or confining the advantage to the plaintiff on the docket, or to the defendant.

We are therefore of opinion that, the objections taken to the character of the award, and the judgment thereon, cannot avail.

The language of the reference gave to the referees all the authority they have exercised, and it is no just cause of complaint on the part of the appellant, that having submitted all claims against him, as well as for him, the tribunal selected by himself, after examining the whole matter, has decided against him, and that the court has given judgment pursuant to this decision. On this judgment an execution may issue for the sum of money awarded, and an attachment will lie to enforce the execution of the releases.

There are several minor objections to which the attention of the court was called, but we do not think they are tenable.

The act of 1785, *ch.* 80, *sec.* 11, expressly requires that, the case be continued, and the powers of this court are quite competent to give such a judgment as the substantial merits

of the case require, without the unnecessary costs and delay to be incurred by sending it back to have the regular continuances entered, the omission of which, if indeed it be an omission at all, is but a clerical error. As to the alteration of the time within which the award was to be completed, we think the answer given at the bar quite conclusive, that there is nothing to shew the period when the last day was agreed on, or to prohibit the court from concluding it was at the original execution of the agreement to refer.

If however, it appeared on the record, that the parties after the case was referred by rule of court, had changed the day, by consent fairly expressed, we should hesitate to say that either party could assign as a ground of objection, that the referees had not completed the award within the time first limited.

To do so would make the court tributary to the fraud perpetrated by a party against a solemn contract, deliberately executed under the eye of the court, and with its sanction.

JUDGMENT AFFIRMED.

THE STATE OF MARYLAND, USE OF A. BEALL, *vs.* HENRY L. HARRISON AND OTHERS.—*June*, 1837.

The principle is well settled, that the judgments of an inferior jurisdiction will not be reversed, except for errors apparent, and that they will be sustained by every fair legal intendment, in favour of their correctness.

Upon the demurrer to the plea of a special *non est factum*, filed in an action on a sheriff's bond, stating as the ground of such plea, that it was executed, and attested on the 18th of January, 1832, it was *held*, that although the bond had not been taken within the time limited by the act of 1794, ch. 54, sec. 8, as the bond of the sheriff *first* returned to the executive, according to the provisions of the constitution; yet that it might have been legally executed, and attested, as the bond of the *second* so returned, given upon the occurrence of either of the events provided for by the constitution of the state. And that therefore, as it may have been legally executed and attested, consistently with all the averments of the defendants' plea, the plaintiff's demurrer thereto ought to have been sustained.

APPEAL from *Calvert* county court.

This was an action of *debt*, instituted on the 21st day of September, 1833, and was founded on a bond bearing date the 18th January, 1832, sealed by the said *H. L. Harrison*, *William Graham*, and *James Harrison*, conditioned for the performance of the duties by *H. L. Harrison*, of the sheriff of *Calvert* county.

The bond was endorsed "securities approved, *Joseph W. Reynolds*, *John Beckett*," and recorded in the office of the clerk of the county court, on the 20th January, 1832.

The plaintiff assigned his breaches in the declaration, and the defendants pleaded a special *non est factum:* to this plea there was a demurrer, which was overruled by the county court, (*Kilgour* and *Wilkinson*, *A. J's.*) The questions involved in the pleadings appear in the opinion of the court.

The appeal was taken by the plaintiff below, and the cause argued here before STEPHEN, ARCHER, DORSEY, and CHAMBERS, Judges.

PINKNEY, for the appellant, contended:

That the judgment of the county court ought to be reversed:

1. Because the validity of a sheriff's bond does not depend on the attestation thereof by the judges or justices of the Orphans' court approving the same, or upon a strict and literal compliance with the form of the statutes of 1794 and 1805.

2. Because the provisions of those acts, are only directory, and to secure the execution of the bond by the parties intended to be bound thereby; and in this case the plea of the defendants admits the execution of the bond, and therefore proof of a compliance with those acts is unnecessary.

3. Because, although the bond was executed after the 1st January, 1832, yet it is binding on the defendants, as the said act of assembly do not declare bonds taken after that day to be null and void, and because in this respect also the said acts are directory only.

4. Because the date of the bond is not relied on in the plea as a defect therein, or as a ground of non-suit, and therefore this court cannot decide upon that objection if now taken by the appellee.

5. Because if the bond for any cause is invalid as a statutory bond, it is nevertheless binding on the parties in this action as a bond at common law, being their own voluntary act.

He cited *Chandler vs. Smith*, *Mass. Rep.* 9 *Cranch*, 28. 11 *Wheat.* 184. 8 *Mass.* 149. 3 *Call.* 452. *Act of* 1831, *ch.* 9.

No counsel appeared for the appellee.

Stephen, Judge, delivered the opinion of the court.

We think that there is error in the judgment of the court below in this case, and that the same ought to be reversed. The action was instituted on the official bond of the appellee, *Henry L. Harrison*, against him, and his sureties, as sheriff of *Calvert* county by the appellant, *Beall*, for the recovery of certain fees due him as clerk of *Prince George's* county court, and placed in the hands of the appellee, as sheriff, for collection. The defendants after praying for and obtaining *oyer* of the bond, put in a plea of *non est factum*, specially stating as the ground of such plea, that the execution of the bond was not attested according to law, that is to say, that it was executed and attested on the 18th day of January, in the year 1832. To this plea the plaintiff demurred generally, and the defendants joined in demurrer. The county court decided the plea to be good, and overruled the demurrer, and the question now to be decided is, whether the judgment of the court below upon that state of the pleadings was correct, and ought to be sustained. The principle is well settled, that the judgment of an inferior jurisdiction will not be reversed except for errors apparent, and that they will be sustained by every fair legal intendment in favour of their correctness. By the constitution of this state it is provided

that, sheriffs shall be elected in each county by ballot, every third year; that is to say, two persons for the office of sheriff for each county, the one of whom having the majority of votes, or if both have an equal number, either of them, at the discretion of the governor, to be commissioned by the governor, for the said office, and having served for three years, such person shall be ineligible for the four years next succeeding; bond with security to be taken every year as usual; and no sheriff shall be qualified to act before the same is given. In case of death, refusal, resignation, disqualification, or removal out of the county before the expiration of the three years, the other person chosen as aforesaid shall be commissioned by the governor to execute the said office for the residue of the said three years, the said person giving bond with security as aforesaid. By the act of 1794, ch. 54, sec. 8, it is enacted, that the sheriffs' bonds "shall be taken on some day between the eighth day of October, and the first day of January in each year," and by the act of 1797, ch. 91, it is enacted, "That upon the death, resignation, refusal, or disqualification of any sheriff, the person appointed to succeed him, shall give bond in the manner prescribed by law, within sixty days from the date of his commission." Although then, this bond has not been taken within the time limited by the act of 1794, as the bond of the sheriff first returned to the executive as duly elected according to the provisions of the constitution, yet from any thing appearing on the pleadings in this cause, it may in all respects have been legally executed, and attested as the bond of the second, so returned, given upon the occurrence of either of the events provided for by the constitution of the state. As therefore it may have been legally executed by *Henry L. Harrison* as the sheriff of *Calvert* county and legally attested in perfect consistency with every averment and allegation contained in the defendants' plea, and therefore be a good and valid bond, we think that the plaintiff's demurrer thereto ought to have been sustained by the court below, and that their judgment should be reversed.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

Bland and Woolfolk *vs.* Negro Beverly Dowling. *June*, 1837.

Slaves in this state cannot enter into valid contracts with their masters, nor can they appear as suitors in our courts of justice, legal or equitable.

The letters of an agent, written to his principal, touching the conduct of a negro, whom the principal, the owner, had agreed to set free, on the payment of a certain sum of money, rejected as inadmissible, being of no more efficacy than unsworn declarations.

If a negro slave, with the permission of his owner, takes up his residence in another state, and afterwards returns to this state, such owner cannot resume his property in him, either for the purpose of servitude within the state, or sale to a citizen of *Maryland*, even although the return of the negro *originally*, was against the owner's consent.

The using, or sale under such circumstances, would be equivalent to a sanction of his return, and an evasion of the act of 1786, ch. 67, prohibiting the importation of slaves.

Appeal from *Baltimore* city court.

On the 31st of October, 1835, the appellee filed his petition for freedom, setting forth, in general terms, his right thereto, which was denied by the plea of the appellants, and issue thereupon joined.

1st Exception.—At the trial, the petitioner proved, that some time prior to the 7th of August, 1833, *Sophia Bland*, one of the appellants, being the legal owner of the petitioner as her slave, who had been hired to some person in *Baltimore*, entered into an agreement with the said slave, that he should be set free, on the payment to her of the sum of $200; in and from which period, until he was arrested in October, 1835, as a slave, he went at large and acted as a free man, by keeping an oyster house, and boot-black shop, and otherwise acting as his own master. He further proved, that on the 17th day of August, 1833, he paid to her, in part performance of said agreement, the sum of $100—on the 25th of October, 1834, the further sum of $23—and, on the 1st of June, 1835, the further sum of $50, for which he obtained receipts, expressed to be on account of his freedom. That shortly after the last payment, the petitioner left *Baltimore*, and proceeded to *New York*, where he was a waiter on board

a steamboat, on the *North river*, until the month of October, 1835, when he returned to *Baltimore*, and paid over to *Jonathan Pinkney, Esq.* through whose hands the other payments were made, the sum of $27, the balance of the $200 which he was to pay for his freedom, which sum was tendered by *Mr. Pinkney* to a *Mr. Law*, the agent of *Sophia Bland*, but refused to be received as such balance. That after the payment of said $27 by the petitioner to *Mr. Pinkney*, and the tender of that sum by the latter, as the balance due under said agreement, the petitioner was arrested in *Baltimore* as a runaway slave, and soon thereafter sold to *Austin Woolfolk*, a citizen of this state, resident in *Baltimore*.

The petitioner then prayed the opinion and direction of the court to the jury, that if the jury shall be of opinion, from the testimony, that the petitioner had his owner's consent to go at large, to make up the price he was to pay for his freedom, and actually became a resident of another state under that permission, he cannot be imported into this state as a slave, and is entitled to his freedom; and that his voluntary return into this state, in October last, did not entitle his former owner to claim and hold him as a slave, but that such return, coupled with a resumption of property by his owner, was, in law, an importation of him from another state. Which direction the court (*Brice*, *Ch. J.* and *Nisbet* and *Worthington*, *A. J's*,) gave. The defendants excepted.

2d Exception.—Upon the preceding evidence, by agreement made a part of this exception, the defendants prayed the opinion and direction of the court to the jury, that even if they should believe the facts given in evidence by the petitioner to be true, that they must find a verdict for the defendants.

1st. Because there is no evidence that said *Sophia Bland* ever gave her assent to the petitioner to depart from the state of *Maryland*.

2d. Because there is no evidence that she ever gave her consent to the petitioner to reside out of the state of *Maryland*, and to reside elsewhere.

3d. Because there is no evidence from which such assent can be inferred,

4th. Because under the evidence the petitioner became a runaway slave, by leaving the state of *Maryland*, without the permission of his mistress, and that being a runaway slave, she had a right to have him apprehended, and to bring him back to, and sell him in the state of *Maryland*.

5th. Because a slave cannot acquire a residence without the consent of his owner, and because there is no evidence to show that the petitioner ever acquired a residence out of the state of *Maryland*, with the consent of his mistress.

6th. Because the return of the petitioner to the state of *Maryland*, was not an importation into this state by his mistress, contrary to the provisions of the acts of assembly in such cases made and provided.

The court refused the above, and instructed the jury as follows: "That if they should be of opinion from the nature of the agreement between the mistress and the petitioners, and the other testimony in the cause, that she consented to his going at large, and acting as a free man, to earn what he was to pay as the price of his freedom, and that she did not restrict him as to the place of his operations, but left that to his own discretion, she is bound by the use he made of that discretion in going to *New York*, or any other place, where he could soonest accomplish the object in view, the fulfilment of his agreement; and therefore may be said, to have consented to his emigration to *New York*, as it was for her benefit, as well as his. And further, that if the jury shall be of opinion, that under the construction of said agreement, her consent was given to his emigration as aforesaid, she could not claim him again, on his return, as a slave, either for sale, or to reside in this state; and, that if the above facts are found by the jury, the petitioner could not be afterwards treated as a runaway, unless, in the interval, his mistress had regained possession of him, and he had left her service without her consent, and against her will." The defendants excepted.

3d Exception.—In addition to the evidence on the first bill of exceptions, the defendant proved to the jury by *James O. Law*, that in the years 1833 and 1834, he was the agent of *Sophia Bland*, in the management and superintendence of her negroes in the city of *Baltimore*, and that in the course of his agency he wrote to her three letters, bearing date the 26th October, 1833, 23d December, 1833, and 7th June, 1834, upon the subject; in some of which complaints are expressed with regard to the conduct of the petitioner. The counsel for the petitioner objected to the admissibility of the letters, and the court having rejected them, the defendants excepted.

4th Exception.—The defendants then gave in evidence by the said *Law*, that he had been the agent for *Sophia Bland* for seven years, and received the wages of her negroes hired in *Baltimore*. That after the contract or agreement made by his mistress to set the petitioner free, on payment of $200, as before stated by him, he did not receive any more wages from him. He disapproved of the petitioner's keeping shop. That the petitioner afterwards, as he learnt from several persons, entered on board a steamboat plying between *Baltimore* and *Frenchtown*, and he frequently inquired for him without effect. He wanted to see him about this agreement he had made with his mistress, and to get what was due her. When the petitioner paid the $23 on the 25th of October, 1834, witness told him, he thought his mistress was not satisfied with his conduct, and would not ratify the contract she had made to set him free, and he offered to pay witness interest for the delay of payment, but it was refused till witness heard from *Miss Bland*, whether she would consent to execute the agreement, as the petitioner had not complied on his part to pay $100 in hand, and the same amount in six months thereafter. That his mistress never required that he should be arrested as a runaway, nor did the witness ever inquire after him, to have him arrested. That the petitioner, when he had got money in the hands of *Mr. Pinkney*, always called and told witness of it.

That said petitioner never had the consent of the witness, nor does he know that he had the consent of his mistress, to leave the state of *Maryland.*

The defendants further proved by *Isaac Mayo,* that on the 15th June, 1834, the defendant, *Sophia Bland,* gave him an authority in writing to act as he thought proper in regard to the petitioner, which he, the witness gave to a constable in *Baltimore,* with instructions to arrest petitioner, inquire what price could be had for him, and inform the witness of it. They then proved by the constable, that in execution of these orders he went in seach of the petitioner, whom he had known as a boot-black in *Baltimore,* but was informed he had gone to *Washington,* and said witness was never after able to find him. They also proved by another witness, that he was well acquainted with the petitioner, and *Sophia Bland,* the defendant, that the former absented himself from *Baltimore,* after the agreement to purchase his freedom, and that his mistress repeatedly inquired for him, and requested witness to inquire for him, which he did, without success.

The petitioner then proved by a competent witness that prior to the agreement before mentioned, he had for several years hired the petitioner as a servant, and on one occasion had leave from *Mr. Law,* the agent of *S. Bland,* to carry him out of the state to *New York,* as a servant, and that after the agreement, the petitioner was frequently out of town, but on his return always called to see the witness and his family.

He also proved by *Jonathan Pinkney,* that the first time he heard of the agreement with the petitioner to purchase his freedom, was from his mistress, one of the defendants, on the 1st day of June, 1835, when he the witness paid her the $50, on account of said agreement, and in part thereof. He never heard said defendant say the petitioner had gone away without her consent, or that she considered said petitioner to be a runaway, nor did he ever hear it from any one else.

The defendants then, upon the whole evidence, prayed the court to instruct the jury, that the petitioner was not entitled to a verdict, and that their finding must be for the defendants.

The court refused to give the instruction, and the defendants excepted.

The verdict and judgment being for the petitioner, the defendants prosecuted the present appeal.

The cause came on to be argued before BUCHANAN, Ch. J. and STEPHEN, ARCHER, and CHAMBERS, Judges.

J. SCOTT and MAYER, for the appellants, contended:

1. That a contract between master and slave, has no validity either at law, or in equity. To constitute a good contract the parties must be free agents, but as the will of master is the will of the slave, the necessary independence, and freedom to make the contract, or not, does not exist. It is no answer to say, that the slave is competent to contract with the consent of his owner, with a third person, because such third person has no control over the slave, who for the purposes of the contract may be regarded as the agent of the master.

Manumission can only be effected by deed, or by last will and testament.

2. It is not denied, that if the petitioner had gone out of the state with the consent of his owner, and had returned voluntarily or compulsorily, and upon such return had been taken up by her, it would have been an importation under the act of assembly, but there is no proof whatever of such assent, and as such conduct would have resulted in a forfeiture of her property the presumptions are all the other way.

Looking to the consequences of assent, the court should require express proof, and not leave it to the jury upon slight or inconclusive circumstances. It has been decided that, a slave is not to be presumed to go at large with the consent of his owner, and the same principle would exclude the presumption that the owner of this slave consented to his going to *New York*.

3. The letters of the agent offered in the 3d exception were admissible. If the answers of the principal were re-

quired, they should have been called for by the other side, but at all events, the non-production of them should have been presented as the ground upon which the admissibility of those offered was resisted. Had that been done her answers might have been produced.

These letters of the agent were the best evidence of their contents, and parol evidence of their contents could not have been given. If that had been attempted, the letters themselves would have been demanded.

R. Johnson and Walsh, for the appellee.

The petitioner from August, 1833, to October, 1835, was permitted to go at large, and to act in all respects as a free man; and the question therefore is, whether the court was not right in putting it to the jury to say, whether his going to *New York*, was not with the consent of his owner, and this depends not simply upon the fact stated in the exception, but the inferences fairly deducible from them. There certainly is no evidence of dissent, nor should such dissent be presumed, because to go at large in this state would be unlawful, and subject the owner to a penalty. *Burke vs. Negro Joe*, 6 *Gill and John.* 143. The presumption then is, that she intended he should leave the state, as that would be lawful, and not remain here, which would be unlawful.

The second inquiry upon this exception is, whether the return of the petitioner to *Maryland* is not within the meaning of the act of 1796, ch. 67. The object of that law was to prevent the augmentation of our slave population, and a construction must be given it, which will best accomplish that object. The going out of the state mentioned in the first section, not only refers to those who go out permanently, but to those who go to reside at all. There can be no doubt that, if the petitioner in this case had been sent back by his mistress, he would be entitled to his freedom, and the purpose of the law being, to prevent the *return* of such persons as *slaves*, his returning voluntarily can make no difference if after such return the owner resumes his property in him. It

may moreover be fairly inferred from the nature of the contract, that he was authorized both to go and return. He was authorized to go to earn the money which he was to pay for his freedom, and to return, that he might make the payment.

Upon this exception they referred to acts of 1796, ch. 67—1797, ch. 15—1794, ch. 66—1832, ch. 40—1833, ch. 67. *Sprigg vs. Negro Mary*, 3 *Har. and John.* 491, 493. *Baptiste vs. De Volunbrun*, 5 *Ib.* 99. 4 *Bac. Abr.* (statute) 649. Act 1783, ch. 23—June session, 1752, ch. 1—Nov. 1790, ch. 9—1791, ch. 57. The evidence at all events *tended* to prove the assent of the mistress to his going, and his subsequent return, and if it had that tendency it was proper to leave it to the jury. *Davis, et al vs. Barney*, 2 *Gill and John.* 403.

2. But the petitioner is entitled to his freedom upon the contract disclosed in the record. There is nothing in the various acts of assembly upon the subject which forbid the master from contracting with his slave. The slave may contract with a third person with the consent of his owner, and there can be no good reason why he may not contract with him, himself, as then his consent will be implied. The act of 1832, ch. 296, sec. 4, recognizes the power of the slave to contract with the assent of his owner.

It is said on the other side, that every contract of manumission is void, unless the terms of the law are complied with; but this notion is incompatible with the many laws curing the defective execution of deeds of manumission. If such deeds are *void* because of those defects, the legislature could not make them valid, and thus deprive the owner of his property. These laws have been passed, not to make but to carry into effect contracts defectively executed, and proceed upon the principle that the slave is competent to contract. Upon this point they cited. *Hall vs. Mullin*, 5 *Har. and John.* 193. The acts of 1715, ch. 44, sec. 11—1832, ch. 296, sec. 4—1831, ch. 281, sec. 5.

3. The letters of the agent, *Mr. Law*, to his principal, were clearly inadmissible. It does not appear in the first place

that, they were received by her, and if they were, they constitute but parts of a correspondence, and should not be separated from the whole, but the entire correspondence should have gone to the jury.

Those letters furthermore, are the mere verbal unsworn declarations of the agent, and as such could not be evidence against the petitioner, when the very party who wrote them was upon the stand, giving evidence upon oath, upon the same subject.

Archer, Judge, delivered the opinion of the court.

Looking at the state of slavery as it exists in this state, and the relations between the slave and his master growing out of such condition, we cannot maintain the principle that a slave can enter into any binding contract with his master, or that he could appear as a suiter in any of our courts of justice, legal or equitable, to enforce any alleged contract. The acts of assembly cited by the counsel for the petitioner do not, we think, give any countenance to the idea. It is apparent from the act of 1715, ch. 44, sec. 11, that anterior to the passage of that law, slaves had been encouraged by traders to purloin the goods of their masters and others, by receiving from them such goods, and turning such trade to their advantage.

It was to strike at this evil the law was passed. It did not recognize certainly any right existing in slaves to deal or barter, for the penalty inflicted on the trader shows directly the reverse, and concedes that the trade, barter, and commerce, was of goods that had been purloined, or conveyed away from some rightful owner other than the slave, there being in case of conviction a forfeiture of the goods to the true owner. The leave or license spoken of in this section, if it apply to slaves, gives to them no power to contract, but merely furnishes an exemption from punishment in the specified case; and might perhaps be considered a relinquishment to the receiver of the rights of the master in the goods so conveyed away, and constituted a very proper exception

from the general provisions of the section—such a case not constituting one of the mischiefs intended, or requiring remedy.

The petitioner in this branch of the inquiry, can derive no support from the act of 1832, ch. 296, for although the word "agreement" is used, it is followed by expressions which we think indicate the sense of the legislature, that they did not mean to use the term contract, in its technical and legal sense. Else why should they have required a manumission, if the agreement had been treated by them as valid, and binding, and as giving freedom? Why should they not have given the same fruits as they would, when followed out by a manumission? Looking at the whole section together, we think the term "*understanding*" was used to qualify the term "*agreement*," or rather to show the meaning which they desired to be attached to that term.

The next question arising under the first bill of exceptions is, whether any evidence exists which should have enabled the court to put the question to the jury, whether the mistress had consented that, the petitioner should reside out of the state.

The agreement to set the petitioner free upon the payment of two hundred dollars is proved; and it is proved that from the 7th of August, 1833, till October, 1835, *upwards of two years he went at large* and acted *as a free man.* We think too, that the receipts furnish evidence that she knew he was going at large up, at all events, to the 1st day of June, 1835, when she signed the last receipt "*on account.*"

Here then is evidence of an agreement to set him free, and here is evidence of a knowledge of the servant's going at large, and acting as a free man, which conduct on the part of the petitioner commences at the very time of the agreement.

Now supposing this agreement to be entered into, and this knowledge to exist, may not the jury legally draw the inference, that this going at large, and acting as a free man, was permitted to enable the petitioner to pay the money he

had agreed to pay? And do not the receipts furnish evidence of her sanctioning during a long period this procedure on the part of the petitioner? There is clearly evidence both of knowledge on this subject, and of acquiescence—and if he should be found to have entered into this agreement—to pay a sum of money for his freedom, and to act as a free man; if in the exercise of this permission he should go abroad into another state, with views of more easily fulfilling his agreement, it is but the exercise of that discretion which every free man has; and which, as it is not limited by any just inference from the testimony, the mistress must take the consequence of the exercise of such discretion. And the jury would be at liberty to infer from the facts a permission to go whithersoever he pleased, so that by so doing, he could the more readily and easily accomplish the fulfilment of the agreement.

We therefore concur with the court in the first exception.

These views lead to the decision of the second bill of exceptions in favour of the opinion of the court below.

The third bill of exceptions presents a question on the admissibility of evidence. The purpose for which the letters were offered is not stated, but we presume they were intended to shew, that either the agent in the line of his duty to his principal had been dissatisfied with the petitioner's going at large, or that his course as indicated by these letters was such as had been dictated by the mistress. These letters are not proven to have been received by her, nor are they shown to have been in her possession, but the bill of exceptions would leave us to infer that they were presented in court by the witness himself.

If offered for either of the above purposes, they were capable of proof by the witness, and should have been testified to by him. As the letters are produced they have no greater efficacy than unsworn declarations, and we think were properly rejected by the court.

The fourth bill of exceptions, although other evidence is incorporated in it, offered by the defendants, does not pre-

sent the question in any light more favourable to them. Whatever dissatisfaction appears to be expressed in relation to the petitioner's course, seems to spring from his failure to comply with his contract; and even after the defendant is informed that the petitioner had gone to Washington. And a year after authority is given to an agent to do what he may think proper as to the petitioner, the defendant received from Mr. Pinkney fifty dollars on account, according to her receipt, and according to Mr. Pinkney's evidence, on account of said agreement, and in part thereof, thereby still recognizing the agreement as an existing one, and speaking to him at the time of the payment of having entered into such an agreement with the petitioner. We therefore concur with the court below in the fourth bill of exceptions.

On the subject of a resumption of the rights of property over the petitioner after his return, and his seizure and sale amounting to an importation within the meaning of the act of 1796, ch. 67, a question involved both in the first, and fourth prayers we have made no comments, because the question was yielded by one of the counsel of the defendants. It certainly could not be successfully contended that, if a residence in another state was granted by permission of the owner, that rights of property could be resumed on his coming within the limits of the state, and that for the purposes of servitude within the state, or for sale to a citizen of Maryland. Even although the return had been *originally* against the consent of the owner, for by such using, or sale to a citizen his return was sanctioned, and if such a course of proceeding do not amount in law to an importation within the meaning of the act, its provisions would be liable to great evasion.

JUDGMENT AFFIRMED.

E. Duvall, Executrix of Grafton B. Duvall *vs.* The Farmers' Bank of Maryland.—*June*, 1837.

G, on the 17th of July, 1827, entered into the following agreement with the plaintiffs. "Whereas, I am endorser of three notes drawn by L, payable to R, and endorsed by R and myself, the first bearing date the 9th of May, 1827, payable at sixty days after date; the second bearing date the 1st of June, 1827, payable at ninety days after date; and the third, bearing date the 20th of June, 1827, payable sixty days after date. And whereas, at my request, the bank which holds the said notes have agreed not to protest the same, or to ask a renewal of them when they become due, I do hereby agree to dispense with all notice of the time of payment, or of the non-payment of said notes, and to be answerable for the amount of said notes, although no such notice is given to me." The bank, on the 17th of September, 1829, instituted a suit against G, to recover the amount of the two notes, dated the 9th of May, and the 20th of June, 1827, when it was *held*, 1st. That with reference to the note *not due* at the date of the agreement, both demand on the maker, and notice to the defendant, the endorser, were dispensed with. 2d. That with regard to the note which *was due*, notice was dispensed with, and that as to the latter, the agreement furnished inferential evidence for the jury of a demand, subject, however, to be rebutted by opposing evidence on the other side.

Although the agreement of the 17th of July, was made under the impression, that the bank, but for it, was under the usual obligation to make demand, and give notice on both notes; yet it does not preclude the plaintiff from showing, by the acts and agreements of the parties anterior thereto, that he was under no obligation to do so, nor is that right denied him, from the circumstance of his having offered evidence that a demand was in fact made.

The holder of a promissory note is not bound to demand payment of the maker, when the latter has transferred to his endorser all his property, to indemnify him against loss for his liability, and the endorser, in such circumstances, is responsible to the holder, though the demand is omitted. But whenever an exemption from the necessity of proving a demand is claimed, the plaintiff must prove the facts necessary to make his case an exception to the general rule.

Where the maker of promissory notes gave to his endorsers a mortgage for their indemnity, with a covenant to pay the responsibilities, at a period subsequent to the maturity of the notes; the effect of such covenant is, not only to prevent a foreclosure of the mortgage before the time stipulated, but all recovery against the maker, on account of the notes prior to that period, though the endorsers are compelled to pay the money earlier. And such covenant has the further effect, to render unnecessary to the responsibility of the endorsers, that the holder should demand payment of the maker, and give notice of dishonour to them.

If in such case, there is more than one endorser, and the mortgage is given to them all, demand and notice are not necessary to enable the succeeding to recover from the preceding endorsers, for the former could have no

recourse to the latter until the time limited in the mortgage for the drawer's responsibility had elapsed.

Evidence to establish a particular usage of a bank rejected, when the officer by whom the usage was offered to be proved, spoke of but a single case of the kind referred to.

Upon a second appeal in the same case, this court may look into, and decide questions involved in the record previously brought up, when a decision of those questions was not made upon the former appeal.

APPEAL from *Anne Arundel* county court.

This was an action of *assumpsit*, brought on the 17th of September, 1829, by appellees against *Grafton B. Duvall.* The plaintiffs declared on a note of *Lewis Duvall*, dated 20th June, 1827, payable sixty days after date, to *Richard Duvall*, or order, for $750, endorsed by him to *Grafton B. Duvall*, and by him to the appellees, in the usual form.

2. On another note, made and endorsed as aforesaid, for $7,857, and in the usual form.

3. On the indebtedness of the said *Grafton* to the appellees, arising on the agreement referred to in the evidence, claiming under a special count upon that contract. The defendant pleaded *non assumpsit*, on which issue was joined.

1st EXCEPTION.—At the trial of this cause the plaintiffs proved the promissory note of *Lewis Duvall*, bearing date, *Annapolis*, 20th of June, 1827, payable sixty days after, to *Richard Duvall*, or order for the sum of $750, endorsed by the payer and *Grafton B. Duvall*, (the defendant) to the plaintiff; and a like note for $7,857, dated 9th May, 1827, endorsed as the previous one; and then proved the following agreement of the defendant:

"Whereas, I am endorser of three notes, drawn by *Lewis Duvall*, payable to *Richard Duvall*, and endorsed by *Richard Duvall* and myself, the first bearing date the 9th day of May, 1827, for $7,857, payable sixty days after date; the second for $300, bearing date 1st June, 1827, payable ninety days after date; and the third for $750, bearing date 20th June, 1827, payable sixty days after date. And whereas at my request the *President, Directors and Company of the Farmers' Bank of Maryland*, who hold the said notes, have agreed not

to protest the same, or to ask a renewal of them when they become due; I do hereby agree to dispense with all notice of the time for payment, or of the non-payment of said notes, and to be answerable for the amount of said notes, although no such notice is given to me. Witness my hand this 17th July, 1827."

The defendant then proved by *Richard M. Chase*, that he the witness, at the time the said note for $7,857, became payable, and for some years before that time, and ever since, was a clerk in the banking house of the plaintiffs, and also a notary public, residing at *Annapolis;* and that during all that time he has been in the habit of transacting all the notarial business of the bank, and the said witness after referring to his record as notary public, further proved, that he had *no* knowledge whatever, of any demand having been made on the drawer of the aforesaid note for payment thereof at the time the same became payable, and that he believed no such demand had been made by him, and that according to the general and constant usage of the bank, the demand of said note, if it had been intended to be protested, unless paid or otherwise provided for, would have been made by said witness.

Whereupon the plaintiffs prayed the court to instruct the jury, that if they should be of opinion from the testimony before them, that the two several notes aforesaid, were signed by *Lewis Duvall*, and endorsed by the payee, to the defendant, and by him to the plaintiffs, and also that the agreement aforesaid was signed by the defendant, then with respect to the first note for $7,857, the said agreement is evidence, that there had been a demand of payment, and it dispensed with notice of non-payment, and that the plaintiffs are entitled to recover, as if there had been other evidence of demand in due time of said first note; and with respect to the note of $750, that the said agreement dispenses with a demand of payment of the said note, and also dispenses with notice of the non-payment, and entitles the plaintiffs to recover the

amount of the last note, without offering other proof than that adduced.

Which instruction the court gave with the further instruction, that the said agreement was evidence that payment of the said note for $7,857, was demanded at its maturity, but like other evidence is liable to be rebutted by other proof; that whether such demand was made is a matter of fact to be found by the jury, upon consideration of all the circumstances and proofs in the cause. The plaintiffs excepted to the further instruction.

2d Exception.—In addition to the proof contained in the first bill of exceptions, the plaintiffs offered proof that the notes on which this suit is brought, were renewals of former accommodations granted to *Lewis Duvall*, and which were from time to time to be renewed, and in addition thereto offered in evidence the two following deeds, from *Lewis* to *Richard* and *Grafton B. Duvall.*

1. A deed dated 9th February, 1825, in consideration of the sum of $6,720, due the grantees in consequence of their endorsing sundry notes for him, the said *Lewis*, negotiable at the *Farmers' Bank of Maryland*, and in order to secure the payment of that sum of money, or any additional sum that may arise due them, the said *Richard* and *Grafton B.* as security for him, the said *Lewis*, as endorsers, and in consideration of the sum of $10, conveying to them all that tract of land called *Greenfield*, except seventy acres as specified, and all the personal estate of him, the said *Lewis*, to be held by way of mortgage for their indemnity, with a covenant to pay the amount for which the grantees may become indebted, on or before the 1st September, 1829.

2. A deed of the 5th July, 1827, reciting an indebtedness of $10,000, and conveying the seventy acres excepted in the deed of 1825, to the same grantees, by way of mortgage for their security.

And thereupon the plaintiffs by their counsel prayed the court to instruct the jury, that if they find the notes on which this action was brought, were renewals of an old accommo-

dation, granted to *Lewis Duvall*, on his notes endorsed by *Richard Duvall* and the defendant, and that at the time the said notes came to maturity, the defendant knew that said notes so sued on, were not to be paid at maturity by *Lewis Duvall*, and that they were to be renewed, but for said agreement, then the plaintiffs are under no obligation to give any other evidence than has been offered, that any actual demand had been made on the said *Lewis Duvall*, for the payment of said notes, but that the jury are at liberty to infer, that the defendant agreed to hold himself liable for said notes, and that the plaintiffs are entitled to recover, as if the plaintiffs had given evidence of an actual demand for payment of said notes, on the days they fell due of the maker.

The defendant by his counsel in resisting said prayer objected, that the said two deeds from *Lewis Duvall* to said *Richard Duvall* and the defendant, and the assignment by *Lewis Duvall* to *Jonathan Pinkney*, (this assignment does not appear in the exception,) before stated were wholly inadmissible as testimony in this cause, and that if they were admissible, did not furnish evidence from which the jury could make the presumptions required by the plaintiffs' said prayer, and did not warrant the court in giving the instruction prayed for, and further insisted that if from the evidence in the cause, the jury should find that no actual demand was made on the said drawer for payment of said note for $7,857, when the same became payable, that the plaintiffs will not be entitled to recover, on the evidence aforesaid on said note for $7,857, and prayed the court so to instruct the jury, which instruction the court refused to give as prayed for by the defendant, but gave the instruction as prayed for by the plaintiffs. The defendant excepted, as well to the refusal as the instruction given.

3d Exception.—In addition to the preceding evidence, the plaintiffs offered in evidence a deed from *Lewis Duvall* to them, dated the 28th July, 1815, conveying by way of mortgage, a tract of land whereon the grantor resided, called *Acton*, and all the adjoining land which the said *Lewis*

Duvall then held, and all the personal estate of him, the said *Lewis Duvall*, which he is now in possession of. And the plaintiffs also offered proof that no payments were made by the defendant or said *Richard Duvall* to the plaintiffs, on account of the said notes so endorsed by them, for said *Lewis Duvall.* Thereupon the plaintiffs prayed the court to instruct the jury.

1st. That if they find from the evidence that the defendant and *Richard Duvall*, the prior endorser on the notes sued for, on the 9th day of February, 1825, obtained a mortgage from *Lewis Duvall* the maker of said notes to indemnify them on account of their endorsements on the original accommodation granted him on the endorsements aforesaid, and that the notes sued upon are a continuation of such accommodations, and that said mortgage was in full force, when said notes fell due, that then the plaintiffs are not bound to give other evidence, than they have offered of a demand on the maker for the payment of said notes when they fell due.

2d. That if the jury find the facts aforesaid whereof the plaintiffs had offered testimony, and also find that said mortgage, and the deed of the 5th July, 1827, and the mortgage to the plaintiffs by said *Lewis Duvall* of the 28th July, 1815, convey all his, said *Duvall's* property, that then the plaintiffs are not bound to give other evidence, than they have given, of a demand on said maker for the payment of said note.

But the defendant again objected to the admissibility of the aforesaid deed of the 5th July, 1827, and insisted that the same was not evidence as offered. And further prayed the court to instruct the jury, if they believed the evidence so offered by the plaintiffs and defendant, if they find that no demand was made on the drawer for payment of said note for $7,857, when the same became payable, that then the plaintiffs will not be entitled to recover on said note.

The court refused to grant the first instruction asked for by the plaintiffs, *but granted the second*, and overruled the defendant's objection to the admissibility in evidence of the

deed of July, 1827, and refused to grant his instruction to the jury as prayed. The defendant excepted.

4th Exception.—The defendant further offered to prove in connection with all the preceding evidence, by *Samuel Maynard*, the cashier of the plaintiffs, that he has been cashier since the month of January, 1828, that from the organization of the bank to his appointment as cashier, he was teller of said bank, and that by the general usage of the bank, all notes discounted at said bank, which are not paid when they arrive at maturity or are otherwise specially provided for, or otherwise directed, are duly presented by the notary public to the drawer, and payment thereof demanded, and if the note is dishonoured, notice thereof is given to the endorsers thereof, for the purpose of showing that if the jury found such usage, the plaintiffs would not be entitled to recover on the note for $7,857, unless they should prove that, at the time the same became payable, a demand was made on the drawer for payment thereof in conformity with such usage. But the court, on the objection of the plaintiffs, refused to permit the evidence to go to the jury for the purpose aforesaid. The defendant excepted.

5th Exception.—In addition to all the preceding proof, the plaintiffs again read in evidence the deed of *Lewis Duvall* of the 28th of July, 1815, to them, and the deeds of the 9th of February, 1825, and 5th of July, 1827, and also offered proof that no payments were made by the defendant, or said *Richard Duvall*, to the plaintiffs, on account of said notes so endorsed by them for said *Lewis Duvall*, and thereupon the plaintiffs prayed the court to instruct the jury:

1st. That if the jury find from the evidence, that the defendant and *Richard Duvall*, the senior endorser on the notes sued for, on the 9th day of February, 1825, obtained a mortgage from *Lewis Duvall*, the maker of the said notes, to indemnify them on account of their endorsements on the original accommodation granted him on their endorsement as aforesaid, and that the notes sued upon are a continuation of such accommodation, and that said mortgage was in full force

when said notes fell due, that then the plaintiffs are not bound to give other evidence than they have offered of a demand on the maker, for the payment of said notes when they fell due.

2d. That if the jury find the facts aforesaid, whereof the plaintiffs had offered testimony, and also find, that said mortgage, and the deed of 5th of July, 1827, and mortgage of 28th of July, 1815, convey all his, the said *Duvall's* property, that then the plaintiffs are not bound to give other evidence than they have given of a demand on said maker, for the payment of said notes. The court refused to grant the first, and granted the second instruction. The defendant excepted to the second instruction.

The verdict and judgment being for the appellees, the appellant appealed to this court, where his death was suggested, and his executrix made a party appellant.

The cause was argued before STEPHEN, ARCHER, and CHAMBERS, Judges.

T. S. ALEXANDER, for the appellant, contended:

1. That the county court was right in the opinion expressed in the first bill of exceptions; that the agreement of the 17th July, 1827, was merely evidence that payment of the note for $7,857 was demanded at maturity, and like all other evidence, was liable to be rebutted by contrary proof—and that whether such demand was made, was matter of fact to be found by the jury upon consideration of all the circumstances. The conclusion is that upon the evidence disclosed by this first bill of exceptions, if the jury had found that payment of the note in question had not been demanded at its maturity—their verdict must have been rendered for the defendant.

2. The facts attempted to be proved by the plaintiffs and disclosed in the second bill of exceptions, did not relieve the plaintiffs from their obligation to make a demand of payment of the foregoing note: nor did they relieve the plaintiffs from their obligation to prove to the satisfaction of the jury, that a demand of payment had in fact been made. The agree-

ment before mentioned is evidence, that under all the circumstances the plaintiffs were bound to make a demand on the drawer for payment of the note, and the defendant agreed to release the plaintiffs from the consequences of their failure to give notice of non-payment, only in the confidence that they had made a regular demand in fulfilment of their obligation. Availing themselves of this agreement which was made with full notice of all the facts, it is too late for the plaintiffs to pretend that new obligations in law were different from what they are solemnly admitted to have been by the agreement. *Powell on Cont.* 222. 1 *Powell*, 132. *Winchell vs. Latham*, 6 *Cowen*, 689.

3. That independent of the agreement, the mere facts, that the defendant, as endorser, had taken a security from the drawer, and that the note in question was a renewal of an old accommodation, and would have been renewed but for an agreement made long after it had arrived at maturity, would not relieve the plaintiffs from the obligation to make a demand on the drawer which existed when the note attained its maturity. *Chitty on Bills*, 209. *Bond et al vs. Farnham*, 5 *Mass.* 170. *Prentiss vs. Danielson*, 5 *Conn.* 175. *Barton vs. Baker*, 1 *Serg. and Rawl.* 1 *Esp. cases*, 302. *Brown vs. Maffey*, 15 *East.* 222.

4. The facts stated in this bill of exceptions were before the court of Appeals on the former appeal, and were necessarily considered as insufficient to sustain a verdict in favour of the plaintiff.

5. The plaintiffs' prayer and the instruction of the court assume, that the papers declared on and offered in evidence were notes really drawn by *Lewis Duvall*, and endorsed, as is attempted to be proved by the plaintiffs, and upon that hypothesis the court instructs the jury in reference to the rights of the plaintiffs in case other facts attempted to be proved should be found. Whereas, the drawing and endorsing of said alleged notes and matters of facts, are within the exclusive province of the jury.

6. That no evidence had been offered to the jury to show

that, at the time the pretended notes declared on came to maturity, the defendant knew that said notes were not to be paid at maturity by the drawer, and that they were to be renewed, but for the agreement which was offered in evidence, and in fact it was impossible that the agreement made long after the first note had attained its maturity could have prevented its regular renewal. *Free and another vs. Hawkins*, 8 *Taunt.* 92, in 4 *Serg. and Low.* 32.

7. The instruction to the jury, that they were at liberty to infer that the defendant agreed to hold himself liable for said notes under the circumstances stated, submitted to them to find the true construction of the written agreement which has been offered in evidence—there being no proof whatever of any other agreement than the agreement in writing. *Boteler and Belt vs. The State*, 5 *Gill and John.* 519. *Stockett vs. Watkin's adm'r*, 2 *Gill and John.* 341.

8. That the deeds from *Lewis Duvall* to *Richard* and *Grafton Duvall*, were wholly inadmissible in evidence, because it does not appear that the plaintiffs or the defendant had notice of them at the time of the dishonour of the first note, or at the date of the agreement between the parties to this action, and because they relate to different transactions.

9. That if these deeds were admissible for the purpose for which they were offered, the court ought distinctly and openly to have instructed the jury that the plaintiffs were under no obligations to make a demand on the drawer for payment of those notes, and therefore were not bound to offer proof of a demand. The defendant was aggrieved by the court's instruction that the plaintiffs were under no obligation to give *any other evidence than had been offered that an actual demand* had been made. Because it was necessarily calculated to mislead the jury into the belief that, sufficient evidence of an actual demand had been offered. Whereas, the proofs showed that no demand had in fact been made; and if it was doubted whether a demand of payment had been made, that question was to be determined by the jury on all the evidence.

10. The second, fourth, eighth, and ninth points, are equally applicable to the court's instruction contained in the third exception, and in addition thereto this instruction will be objected to for that

11. There was no evidence from which the jury could find that the deeds offered in evidence covered all the property of *Lewis Duvall.*

12. That if these deeds did cover all the property of said *Lewis Duvall*, they would not relieve the plaintiffs from their obligations to make a demand.

13. That the court erred in refusing to permit the defendant to prove the usage of the bank as stated in the fourth bill of exceptions.

The whole case turns on the question of an actual demand. It was the usage of this bank to make a demand of all notes. It extended to cases in which the bank was secured. The custom of this bank shows its obligation to make a demand: that bound both the bank and its customers. It might form a special custom to its own prejudice, in derogation of the common law, and for the sole benefit of its customers. 1 *Har. and John.* 180. *Renner vs. Bank of Columbia*, 9 *Wheat*, 581. *Thornton vs. Bank of Washington*, 3 *Peters*, 36.

The plaintiffs having alleged a demand must prove it. He cannot in such a state of pleading prove an excuse for want of a demand. The proof offered is an excuse arising from special circumstances for the demand. Proof from which a jury may infer a demand—or what amounts to a demand may be proved. *Chitty on Bills*, 362. *City Bank vs. Cutter et al*, 3 *Pick.* 414. *Blakely vs. Grantt*, 6 *Mass.* 388. *Cory et al vs. Scott*, 3 *Barn. and Ald.* 619.

Can the party recover in this case on the count for money lent. It is true the defendant was second endorser, next holder, but the proof shows that the discount was for the accommodation of the drawer. The defendant being a mere security is not liable on the money counts. *Chitty on Bills*, 364, 366. *Wells vs. Girling*, 8 *Taunt.* 737. *Page's adm'rs*

vs. Bank of Washington, 7 *Wheat.* 38. *Wells vs. Girling*, 4 *Serg. and Low.* 264.

If the remedy is gone against the drawer by laches, then the plaintiffs cannot resort to the money counts against the endorser.

McMahon, for the appellant.

As to what is a waiver by an endorser, and what by drawer, and their different consequences, he cited *Borradaile vs. Low*, 4 *Taunt.* 93, 94, 95.

As to the effect of a promise to pay, and to show this is a *nude pact* by reason of a prior discharge of the promisor; and the competency to repel an express promise, as being made on a mistaken notion of liability. 1 *Har. and John.* 187. *Turnpike Co. vs. McKean*, 10 *John.* 162. *Jones and Maim vs. Savage*, 6 *Wend.* 660.

As to what questions have in fact come up on the record, and that the court must look at the evidence with reference to the instruction granted below, though it should state the whole evidence in the cause, he cited *Whiteside vs. Jackson*, 1 *Wend.* 421. *Dean vs. Gridley*, 10 *Wend.* 257.

The record is no estoppel that facts impliedly admitted are not true. The truth of the implication may yet be inquired into. *Arch'd*, 222, 223. And he submitted the following additional points:

That the evidence offered in the second exception to prove the knowledge of the defendant that the notes offered in evidence were renewals of an old accommodation granted to *Lewis Duvall* on his notes, endorsed by *Richard Duvall* and the defendant, and that at the time the said notes came to maturity, the defendant knew that said notes so sued were not to be paid at maturity by *Lewis Duvall*, and that they were to be renewed but for said agreement, was inadmissible under the declaration in this case to prove any agreement of the defendant to hold himself liable for said notes without demand, or that the plaintiffs were entitled to recover as if they had given evidence of a demand. That the evi-

dence offered in the third and fifth exceptions in this case was inadmissible under the declaration in this case to prove the facts and circumstances hypothetically stated in the plaintiffs' prayers contained in both of said exceptions, as an excuse for non-demand (or for not giving any other evidence of demand) than they, the plaintiffs had already offered.

RANDALL, for the appellee.

Upon the construction of the agreement cited: *The Union Bank vs. Hyde*, 6 *Wheat.* 572.

On the third and fifth exceptions, and that *Duvall* had conveyed away all his property, which excused giving notice to the defendants; under the circumstances he cited: *Birely and Holtz vs. Staley*, 5 *Gill and John.* 433. *Bond, et al vs. Farnham*, 5 *Mass.* 170. 3 *Kent Com.* 113. *Clopper's adm'r vs. Union Bank*, 7 *Har. and John.* 102. 1 *John. Cas.* 99. *Duryee vs. Dennison*, 5 *John.* 248. *Beck vs. Thompson and Maris*, 4 *Har. and John.* 531.

On the mode of establishing a usage and its duration, he cited: 2 *Starke*, 451. 1 *Conn. Rep.* 43. *Bank of Columbia vs. Magruder*, 6 *Har. and John.* 172.

Under allegation of demand and notice, a waiver may be given in evidence, and in such cases the pleadings must take the ordinary form. *Norton vs. Lewis*, 2 *Conn. Rep.* 478. *Williams vs. Matthews*, 3 *Cow.* 222. *Taunton Bank vs. Richardson et al*, 5 *Pick.* 436. *Barker vs. Parker*, 6 *Ib.* 80.

A. C. MAGRUDER, for the appellee, cited:

Beck vs. Thompson and Maris, 4 *Har. and John.* 531. *Chitty on Cont.* 6.

MCMAHON, in reply.

After an examination of the former decision in this cause, reported in 7 *Gill and John.* 46, and the state of the prayers offered, and opinion pronounced in this trial upon the questions of demand, and notice, and waiver of notice, he further cited: *Hopkins vs. Liswell*, 12 *Mass.* 52. *Philips, et al vs. McCurdy*, 1 *Har. and John.* 187, *Beck vs. Thompson and Maris*,

4 *Ib.* 531. That the defendant here was not estopped from an inquiry into the fact, whether a demand had been made. 3 *Bibb.* 104. *Chitty on Bills*, 238. *Arch.* 222, 223. An agreement to renew a note will not dispense with notice if not renewed. *Chitty on Bills*, 209. 3 *Camp.* 107. *Barton vs. Baker*, 1 *Serg. and Rawl.* 336, 337. An endorser may not demand notice of non-payment, when he is fully indemnified, or when he has agreed to pay as maker. 1 *Esp.* 300. Upon the state of the proof, and the questions open for discussion or exception to admissibility of evidence, he cited: *Sothoron vs. Weems*, 3 *Gill and John.* 435—441. Upon the state of the pleadings, and right to prove a waiver under the allegation of demand, refusal, and notice, he cited: *Chitty on Bills*, 362. *Bond, et al vs. Farnham*, 5 *Mass.* 170. *Blakely vs. Grantt*, 6 *Mass.* 388. There are some conflicts in the authorities, but the general rule of law is sustained, that an excuse intended to be relied on is usually pleaded, and the proof confined to the excuse.

The money counts are not sustained here, because the facts destroy all privity of contract between the bank and the defendant. *Free and another vs. Hawkins*, 8 *Taunton*, 92. *Beck vs. Thompson and Maris*, 4 *Har. and John.* 535.

On the law of the usages of specific and particular banks, which usages need not extend over a whole state or territory, he cited: *City Bank vs. Cutter et al*, 3 *Pick.* 418. *Loring et al vs. Gurney*, 5 *Ib.* 15. *Thornton vs. Bank of Washington*, 3 *Peters*, 36. *Bank of Columbia vs. Magruder*, 6 *Har. and John.* 180.

Upon proof of usage of a particular bank, the law presumes knowledge thereof in persons trading therewith, and their assent to such usage. Such usage controls the general law, and forms a part of the contract as much as if incorporated therein. In this case the usage is not denied, but is left on the proof of the defendant.

Archer, Judge, delivered the opinion of the court.

When this case was last before this court, on appeal, the court gave a construction to the agreement of 17th of July,

1827, and determined, that certain inferences of fact were deducible from the agreement.

The construction placed upon the agreement was, that on the note *not* due, both demand and notice were dispensed with; and, that on the other note, which *was* due, when the contract was entered into, notice was dispensed with; and it was further decided, that the inference, as an inference of fact, to be drawn from the acts of the parties in this agreement was, that there had been a demand, and of course that the agreement was evidence of a demand. But it was not meant to be intimated, that this inference of a fact was to be conclusive; on the contrary, the court below have rightly interpreted the opinion of this court, in deciding that such inference may be rebutted.

The cause having been remanded to the court below, and rebutting evidence having been offered, the plaintiff deemed it necessary to take the opinion of the court, whether under the evidence in the cause any demand was necessary to be made, or notice given.

This we think it was entirely competent for the plaintiff to do. We do not perceive any thing in the agreement of the 17th of July which prevents it. That agreement was, however, certainly made under the impression, by the parties, that the bank, but for the agreement, was under the usual obligation to make demand, and give notice on both notes. The agreement, however, notwithstanding its construction, and the inferences which may be drawn from it, cannot prevent the plaintiff from showing, if he can show, that the acts and agreements of the parties anterior to the agreement of the 17th of July, have dispensed with demand and notice, and rendered them unnecessary; nor do we perceive, that because the plaintiff had offered evidence of a demand, that he could be precluded from showing, that no demand was necessary to have been made; and accordingly the plaintiff has relied on several matters, each of which, it is alleged, is sufficient to enable the plaintiff to recover in the same manner as if a demand had, in fact, been made.

1. That the defendant knew that the notes were not to be paid at maturity, and that they were, but for the agreement, to be renewed.

2. That all the endorser's property had been conveyed as an indemnity, and to secure the payment of the endorser's liability.

3. That by the deed of mortgage of 1825, the defendant has placed it out of his power to sue the drawer in case of his default, till 1829.

As to the *first* proposition, without an inquiry into the legal effect of a knowledge on the part of the defendant, that the notes would not be paid, it may be sufficient to observe, that we can perceive no evidence in the cause from which it can be inferred, that when the first note arrived at maturity it was known to the defendant, that it was not to be paid. The agreement, it is true, stipulates that it was to lay over; but that was not entered into for several days after the note had arrived to maturity. There is evidence that the notes were renewals of former accommodations, and that they were to be renewed from time to time. But with whom was this understanding that the notes were to be renewed? There is no evidence to shew, that the defendant was, in any manner, a party to such agreement. The accommodation was for the benefit of the drawer, and although he might have entered into an agreement with the bank, that his note should be renewed, it could not affect the endorser, unless he was in some way privy to, or participated in the agreement for such renewal. Giving the greatest legal efficacy to such an agreement, as between the immediate parties to it, the endorsers, strangers to it, at the maturity of one of the notes, must still be considered, so far as this question is concerned, as standing upon their conditional liability as endorsers, and entitled to have a demand made on the drawer, and to have notice given to them. The deeds offered in evidence do not appear to throw any light on this branch of the case. The covenant by the drawer, in his deed of mortgage, to pay his liabilities to the bank in 1829, viewed in the light of an agreement by

them to give him time to pay, and indemnify them in case they should be compelled to pay as his security, does not look to any agreement existing between the bank and the drawer for a renewal of those notes; but on the contrary, it is plain from the deed, that the parties looked to the probability of payment by the drawer, before the time when the mortgage should be forfeited. As it regards the agreement of the 17th of July, it may be sufficient to remark, that we have heretofore determined, that it might be inferred from it, that the notes were, but for its stipulations, to have gone through the customary forms of demand and notice; and we cannot therefore, deduce from it now, an inference directly the contrary. The notes in controversy were at their maturity, according to the usage of all banks, to be either paid or renewed. The note over due at the date of the agreement, had not been paid, and anxious to avoid a protest, the defendant had only stipulated that the bank should waive its practice in this respect, of either protesting, or of asking a renewal, and ought not to be considered as evidence, that any arrangement had existed between the endorsers and the bank, either at the maturity of the note, or at any anterior period, that the note was to be renewed.

2. The position that a transfer of all the drawer's property to the endorser to indemnify him against loss for his liability, exempts the holder from the necessity of making a demand, might, perhaps, if it were a new question, admit of some discussion, unless shown to be amply sufficient to meet the notes. But then there are respectable authorities which sanction the doctrine. *Bond et al vs. Farnham*, 5 *Mass.* 170. *Morton vs. Lewis*, *Conn. Rep.* 478. 3 *Kent Com.* 113. *Barton vs. Baker*, 1 *Serg. and Rawl.* 334. And it is important that the law in relation to commercial paper should be uniform in the states of the union. We therefore adopt the judgments of the Supreme court of *Massachusetts*, *Connecticut*, and *Pennsylvania*. And on this branch of the case, the only question remaining is, whether there was evidence that all the property of the drawer had been assigned to the defendant.

The plaintiff who desires to exempt himself from the necessity of proving a demand, must prove the facts necessary to make his case an exception to the general rule. The *onus* is on him, and is rightfully upon him. Does he offer sufficient evidence of the fact when he shows the deed for the maker's plantation, excepting seventy acres, and all his personal property? Certainly not. The very evidence offered showing unassigned property—and yet, that is the only legitimate evidence offered to prove the fact here, for the deed of the 5th July, 1827, conveying the seventy acres to *Richard* and *Grafton Duvall*, is a mortgage for a then existing debt of $10,000, alleged to be due them from *Lewis Duvall*. And if the terms of the deed are to be regarded, it could not *prima facie* have reference to these claims, for which they were only security, and towards which, they had not paid a dollar. But if it had reference to their endorsements, was not the plaintiff bound to go further, and by showing the extent of *Lewis Duvall's* possessions, give the jury evidence from which they could infer, that he had assigned all as an indemnity for this debt? *Lewis Duvall* may have owned ten times the amount of the property here conveyed, for any thing which appears from the conveyance. We do not think enough had been proven, to throw the defendant upon proof that *Duvall* held other property—nor do we conceive, that by demanding further proof to show that all his property was conveyed, we are calling on the plaintiff for negative proof. The plaintiff is not asked to prove that he had no other property, but to show affirmatively, what property he had, and that all such property as he was known to have, had been conveyed. There is nothing in the deeds that indicate, that all was conveyed: nor can an argument be drawn from the fact, that as he has conveyed all his personal property combined with real, that all his real estate is conveyed, because the very deed by which all his personal property is conveyed makes a reservation of land. But if it had not contained this reservation, it still would not have been legitimate to deduce from it, the

fact that all his lands were thereby assigned. We therefore think there was not sufficient evidence to support this proposition.

3. The third matter relied upon, involves the consideration of the mortgage of 1825. This instrument of indemnity was taken before the particular notes sued on had an existence: but the mortgage by its terms applied to them, for it was taken not only to secure the particular debt then specified, but applied to any additional sum, that might arise, due them as his endorsers, anterior to the period stipulated in the mortgage for the payment of the money by *Lewis Duvall*, so that whether these notes were in fact renewals of accommodation notes existing at the time of the mortgage, or mere debts arising due to the bank subsequent thereto, upon which they, the mortgagees, were endorsers, the mortgage was in either view intended as an indemnity.

In this mortgage there is a covenant on the part of *Lewis Duvall*, to pay the amount for which they may become indebted, on or before the 1st of September, 1829. The effect of this covenant was, in our judgment, not only to prevent the foreclosure of the mortgage, before the time stipulated, but as between the parties to prevent all recovery against *Lewis Duvall*, of the amount of these responsibilities, until the time limited, in case the endorsers or either of them were compelled to pay them. Had the endorsers paid these notes and instituted an action of *assumpsit* against their principal, to recover the amount paid, we think the covenant contained in the mortgage, might have been produced to show the extension of time agreed to be given, and that the suits were prematurely brought. If this be true, the endorsers, in our judgment, were not entitled to notice. They had put it out of their power to sue the drawer. The object of the law in requiring notice is to enable the endorser to have his remedy over against the party responsible to him, and if he could have no recourse, for more than two years after the note fell due, having by his agreement with the drawer disabled himself therefrom, we think the demand and notice required accord-

ing to the general rule of law, as applicable to these instruments, was rendered unnecessary to the responsibility of the endorsers, nor was it necessary, as we think, to observe these rules in this case, to enable the last endorser to have immediate recourse to his first endorser, as they had both taken this mortgage, and granted the drawer indulgence; for we do not think, that the last endorser, in the face of this mortgage, could have had any recourse to the first endorser, until the time limited in the mortgage for the drawer's responsibility.

The aforegoing views dispose of the second, third, and fifth exceptions of the defendant, in each of which, we think the court were in error in granting the plaintiffs' prayers.

We, furthermore, think the court erred in admitting in evidence the deed of the 5th of July, 1827.

In relation to the *fourth* exception, we think the court were right in declaring the evidence therein offered, as inadmissible. We mean to express no opinion, how far such a usage as that attempted to be established, would render a demand and notice necessary, because we do not think the evidence offered was admissible to establish such an usage.

In all the evidence offered, there is but a single instance proven of notice, where the bank knew of the conveyance of all the drawer's property to indemnify the endorser; and a single case of that description ought not to be allowed to go to a jury to establish an usage.

In the former trial of this cause, in this court, there existed no evidence in any of the bills of exception, of *non-demand*, as there does in these exceptions, and we did not, therefore, examine the questions involved in the fifth and sixth bills of exception in the former record, as we supposed our determination in relation to the agreement furnishing evidence of a demand, would dispose of the whole case, when it should a second time have been submitted to a jury, and that the questions really meant to be raised in the fifth and sixth exceptions of that record, would never arise again.

Looking to the fact, that in expressing our former judgment, we expressly waived an examination of the law involved in those exceptions, and did in truth, never examine, or in any manner decide it, on that appeal, we cannot concur in the argument, that such judgment shuts the door to an examination thereof on this appeal. But, although we think the court below erred, we cannot reverse their judgment, because we think the plaintiff was entitled to recover, and therefore must enter their

JUDGMENT AFFIRMED.

GEORGE FITZHUGH AND OTHERS *vs.* WILLIAM S. McPHERSON, *adm'r d. b. n. of* LEWIS NETH.—*June*, 1837.

The objection, that a commissioner to take evidence under a commission from chancery, had not taken the oath annexed to the commission, is excluded from the consideration of this court by the act of 1832, ch. 302, it not having been made the ground of exception before the chancellor.

Exceptions filed in chancery under the act of 1832, ch. 302, after the decree, will not avail.

The design of the legislature was that the grounds of objection adverted to in the act of 1832, ch. 302, should be taken by exceptions filed in the cause before the passage of the decree, that the chancellor whilst decreeing, might have them in view, and that the opposite party might resort to the appropriate means of obviating their effects in chancery.

One of several defendants in equity who had answered the original bill, need not answer an amended bill, the points of amendment not affecting his interest in any way.

Defendants in equity who have not answered an original bill, are by an amended bill called on to answer both together; and the subpœna issued on the amended bill, calls for an answer to both.

The recital in a decree that an order to take a bill *pro confesso* unless, &c. had been duly served, is sufficient evidence of the fact of service in the appellate court.

C, as the agent of D, executed an assignment of a mortgage to B, in 1806. The mortgagors for about twenty-five years continued, time after time, to pay to B, and those claiming under him, interest due on the debts assigned. One defendant admitted the appointment of the agent, and others gave bond to the assignee to secure the debt. Under such circumstances, no express proof of the agent's power to make the assignment is necessary.

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G. executed a mortgage to secure one debt—G. Jr., D, and M, executed a subsequent mortgage to secure the same and another debt. The mortgagors held different estates in the land, and both the debts came by assignment to the same party. In such a case the chancellor could not decree definitively unless he had all parties before him, and therefore all these subjects could be included in one bill.

An order to take a bill *pro confesso*, unless the defendant answers it by a day given, cannot be anticipated, and a decree *pro confesso* passed in anticipation of such day.

In considering whether a suitor in court is guilty of a wilful default, the court will not impute to him the same degree of knowledge of the practice of the court as that ordinarily possessed by the solicitors.

A party is not liable to pay compound interest on a debt for which he is jointly liable with others, upon their agreement to pay such interest. His assent to such an arrangement must be shown.

An interest may appear to be outstanding, as against one of the defendants in a chancery cause by his admission so as to make its proprietor a necessary party, though at the same time such interest as respects the other defendants, and the complainant in the cause, is barred by lapse of time. The want of such a party in a cause affecting real property and requiring a sale of it, would induce this court to remand the cause under the act of 1832, ch. 302.

Mortgagors cannot agree to compound interest and make it a charge on the mortgaged premises, to the prejudice of any portion of the mortgagees secured by such mortgage, or to the prejudice of subsequent mortgagees of the same property.

The decree which orders a sale of mortgaged property and its proceeds to be brought in for distribution, does not settle the rights of mortgagees *inter se*, and that there may be a conflict between them, after sale, is no ground for reversal.

APPEAL from the court of *Chancery*.

The bill in this cause was filed on the 6th day of April, 1833, by *Samuel Maynard*, administrator *de b. n.* of *Lewis Neth*, alleging that on or about the 10th October, 1791, *George Fitzhugh*, *the elder*, of *Baltimore* county, (since deceased,) conveyed unto *Walter Dulany*, (since also deceased,) certain real and personal property in trust and by way of mortgage, amongst other things to secure unto one *Daniel Dulany*, since deceased, the payment of the sum of £230, then due and owing from the said *George* to the said *Daniel;* that afterwards *Walter Dulany*, conveyed all the aforesaid property to *Mary Fitzhugh*, *George Fitzhugh*, *Jr.* and *Daniel D. Fitzhugh*, and thereupon the said grantees on the 27th April,

1805, conveyed certain real and personal estate unto *Rebecca Dulany*, who was the executrix of the said *Daniel*, and to the said *Walter Dulany*, in trust and by way of mortgage, amongst other things to secure unto the said *Rebecca* as executrix, the payment of the aforesaid sum of £230, and the further sum of £400, *with interest due thereon.* The bill then charged that the debts secured by the said mortgages, have become satisfied, and the trusts thereby created have been fulfilled, excepting only in so far as the same relates to the aforesaid sums of £230, and £400 and interest. That said sums remaining due, the right and title to the same, and the aforesaid mortgage last mentioned as a security therefor, were duly assigned and transferred unto *Lewis Neth*, that on or about the 22d April, 1822, the said *Mary*, *George* and *Daniel D. Fitzhugh*, came to a settlement with the said *Lewis Neth*, upon which the sum of $5,915, was due, for which they delivered to him their bond of that date, conditioned to pay said last mentioned sum with interest; that on the 26th January, 1825, the said *Mary*, *George* and *Daniel*, delivered unto *Lewis Neth*, an instrument (exhibit D,) declaring that the aforesaid bond was given for the principal and interest of the debts found by the said mortgage, and that the sum mentioned in said bond was a continuing charge, on the property mentioned in the mortgage. That a large sum is now due to the estate of *Lewis Neth;* that since the execution of the said mortgages, *Mary*, *George and Daniel D.* have executed another mortgage to *the President and Directors of the Bank of Maryland* of the property aforesaid. Prayer for a sale of the property to pay *Neth's* debt, and for subpœna against *Mary*, *George* and *Daniel D. Fitzhugh*, and *The Bank of Maryland*, and for general relief.

The deeds referred to were exhibited with the complainant's bill.

The answer of *Daniel D. Fitzhugh*, admitted the mortgage from *George Fitzhugh* to *Walter Dulany*, but denied the alleged death of his father, *George.* It also admitted, the mortgage to *Rebecca*, but denied that the debts secured by

them were paid. It alleged that the debt in the first mortgage is due to *Upton Scott*, with interest thereon since 1809; that the second, was assigned by *Rebecca Dulany*, to *Thomas Buchanan;* that the whole of the interest due on the debt of £400, was paid to him up to the 31st March, 1810, and that the said *debts* afterwards by assignment came to the said *Lewis Neth*, but the defendant has no knowledge of the assignments of the *mortgages*. The settlement with and bond given to *L. Neth*, was admitted to have been made, but alleged there was a considerable mistake made in the calculation, and that a less sum was due than was admitted, which he prayed might be corrected—that a balance is still due. That exhibit filed with the bill was executed by *George Fitzhugh, the elder*, who is not made a party, and by *George Fitzhugh, Jr.* who is made a party. This defendant admits that he mortgaged a part of the property described in the proceeding to *The Bank of Maryland*, in which *Mary* and *George Fitzhugh*, did *not* join; that he still owes the bank about $1,450. Prayer to be dismissed.

The complainant on the 30th December, 1833, prayed leave to amend his bill by making *George Fitzhugh, the elder*, a party defendant, for a discovery whether *George Fitzhugh, the elder* or *younger* executed the bond to *Lewis Neth*—and for an order of publication against *Walter* and *Rebecca Dulany* as absent defendants.

On the 19th December, 1833, the chancellor passed an order, reciting that the defendants, *George* and *Mary Fitzhugh* and *The President and Directors of the Bank of Maryland* being returned attached, for not answering, and not having answered, and directing the said defendants to answer, before the 4th day of December term next, otherwise the chancellor would take the bill *pro confesso*, or direct a commission to issue to take evidence.

The Bank of Maryland then answered, claiming $1,450, due them from *D. D. Fitzhugh.*

On the 1st day of April, 1834, the chancellor passed an order, taking the bill *pro confesso*, against the defendants

George Fitzhugh and *Mary Fitzhugh*, and ordered a commission, and the same as to *George Fitzhugh*, *the elder.*

After proof taken in the cause, which is sufficiently adverted to in the opinion delivered in this court, the chancellor on the 12th November, 1835, referred the cause to the auditor to state an account showing the amount due to the complainant. Further testimony was taken before the auditor. The auditor reported six accounts—the complainant objected to five of them, and prayed that account number five should be confirmed. The defendants filed no objections to the auditor's statement prior to the decree; account number five corresponded with the exhibit filed with the bill, showing the settlement at the time the bond was given to complainant, and the sums since received. This account was confirmed by the chancellor, and the mortgaged premises ordered to be sold by a trustee of the court for the purpose of paying the balance due, according to that account, by his decree of the 7th January, 1836.

In February, 1836, the defendants filed the exceptions to the evidence and the auditor's statements, and then took their appeal to this court.

The cause came on to be argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

BELT and G. L. DULANY, for the appellants, contended that the decree of the chancellor ought to be reversed:

1. Because the commissioners did not take the oath annexed to the commission, and their proceedings under the commission are therefore null, and there is no evidence in the cause. *Massey vs. Massey*, 4 *Har. and John.* 144.

2. Because it does not appear from the record that the defendants, in the original bill, were summoned to answer to the amended bill.

3. Because the order, *pro confesso*, of 19th December, 1833, was not served upon *George Fitzhugh* and *Mary Fitzhugh*, by the 25th February, 1834, or at any other time.

4. Because the said order, *pro confesso*, gives the defendants until the 4th of December, 1834, to answer the bill;

and yet a decree, *pro confesso*, was passed against them on the 1st day of April, 1834.

5. Because there is no evidence that *William Cooke*, who signed the assignment to *Thomas Buchanan*, as the attorney for *Rebecca Dulany*, was the attorney of *Rebecca Dulany*.

6. Because the decree is for the sale of all the lands mentioned in the proceedings for payment of the two debts of £230, and £400, added together, and interest compounded thereon, when complainant's exhibits, A and B, shew that the life estate of *George Fitzhugh*, *the elder*, in 500 acres, and his fee simple estate in 188 acres, never were charged or chargeable with the payment of the debt of £400.

7. The parties having titles to the mortgaged premises, are *George Fitzhugh*, *the elder*, who held a life estate in 500 acres, and a fee simple estate in 188 acres, and *Mary Fitzhugh*, *George Fitzhugh*, and *Daniel D. Fitzhugh*, who held the reversion in fee in the 500 acres; and an agreement to compound the interest, and render it a charge upon the whole property, must be made by all the parties in interest, but complainant's exhibits, C and D, shew that the agreement was made by three only of the four, and whether made by *George Fitzhugh*, *the elder*, or by *George Fitzhugh*, *the younger*, is left in uncertainty. Yet the decree is against all four, for the sum of $8,162 22, when the whole sum due from the party who did not enter into the agreement, could only have been $3,400 46, as appears from the auditor's account, No. 6.

8. Because the legal representatives of *Walter Dulany*, deceased, mentioned in complainant's exhibit A, and *Upton Scott*, or his legal representatives, are parties in interest, and should have been parties to the cause.

9. Because the mortgagors cannot, by any agreement, compound the interest on the principal debt, and render the whole a charge upon the lands, to the prejudice of those whose debts are secured by the same mortgage, and of the *Bank of Maryland*, a subsequent mortgagee.

10. Because exhibits A and B, being conveyances of different estates, by different parties, at different times, to secure

(in part) different debts, ought to have been the subjects of separate and distinct bills, and could not properly be embraced in one bill.

ALEXANDER, and R. JOHNSON, for the appellee.

1. The first point relied on is, that it does not appear that the commissioners took the oath which is annexed to the commission, and therefore the testimony is inadmissible; and 4 *Har. and John.* 144, is cited as an authority in support of the position.

On examination it will be found, that in the case cited, a commission had been issued to make partition under the act to direct descents; and the court decided, that the commission and proceedings were defective, because the oath of the commissioners was not annexed to the same, and because the commission and return did not appear to have been ratified by the court, and refused to permit the commission, &c. to be read to the jury.

The court of Appeals affirmed this opinion without assigning their reasons; and may therefore have decided merely that the commission, &c. were inadmissible, because they had not been confirmed by the court. But whatever may have been the grounds of the decision, the case is not in point to show, that testimony is to be suppressed, because it does not appear that the commissioners took the oath prescribed to be taken.

It will be found on referring to 2 *Mad. Ch. Pr.* 413, (and the same rules are laid down in all other books of practice,) that regularly all objections to the execution and return of a commission, should be made before it passes publication; and if the testimony is suppressed, the court will permit a new examination for advancement of justice. In this state, objections are in general permitted to be made at the hearing, but are admitted with the same consequence—that the court will give time to remove the objection by a re-examination or otherwise, in order to prevent the obstruction of justice. And it is apprehended that the *Maryland* practice is to be taken, with the further qualification, that at the hearing in

chancery, (and *a fortiori* upon the hearing of an appeal,) every fair and reasonable intendment will be made in favour of the regularity of the proceeding. If this presumption is admissible, it will destroy the objection here made—which is not, that it does appear that the commissioners did not take the oath—but that it does not appear that they did take it.

Thus would stand the practice, independent of the act of 1832, ch. 302, sec. 5. But by that act it is provided, that "all objection to the competency of witnesses, and the admissibility of evidence, and to the sufficiency of the averments of the bill or petition, shall be made by exceptions filed in the cause. And no point relating to the competency of witnesses, or admissibility of evidence, &c. &c. shall be raised in such causes in the court of Appeals, or noticed, or determined, or acted upon, by the court of Appeals, unless it shall plainly appear in the record, that such point had been raised by exceptions as aforesaid, in the court of Chancery, &c."

An objection to the regularity of the execution and return of a commission, and to the right of the party to use the testimony taken under the same, is an "objection to the admissibility of evidence." Such objection, therefore, cannot in this court, be raised, or noticed, or determined, or acted upon, unless it shall plainly appear by the record, that the same was first raised by exceptions filed in the cause in the court of Chancery. It is incumbent on the appellants then, to show that this same point has been properly raised by exceptions in the court below. Can this be shown?

The final decree is dated on the 7th January, 1836. On the 18th February, 1836, nearly five weeks after the decree, and just as they were about to enter their appeal, the appellants filed their exceptions. Was this a compliance with the act of 1832? The appellee insists that it was not. The leading object of the act was, to prevent a party from springing upon his opponent in the court of Appeals, with objections which might have been obviated, if they had been suggested at any time before the decree. But the decree fixes the state of the parties. No amendment to pleadings or

proofs can be made at any time after a final decree. To gratify the intent as well as the letter of the act, then it must be laid down, that every objection must be filed before the final decree. For if exceptions are allowed to be filed after that event, the act will be virtually repealed by defeating, effectually, its objects.

The language of the act of 1832, is very similar to that of the act of 1825, ch. 117, relating to appeals from judgments of a court of common law. It has never been supposed, that a defect in the bill of exceptions could be insisted on by filing an objection after the judgment was rendered.

The truth is, that the commissioners were sworn, as could have been shown if the objection had been made at an earlier day.

2. The next objection is, that the defendants to the original bill were not summoned to answer to the amended bill.

At the time of filing the amended bill, none of the defendants to the original bill had filed their answers, excepting *Daniel D. Fitzhugh*; and instead of praying *subpœna* against them, it prayed they might answer the amended bill at the time they should answer the original bill.

In 2 *Mad. Ch. Pr.* 369, it is said, that new *subpœnas* are not necessary in an amended bill.

1 *Fowl. Ex. Pr.* 106, an amended bill is considered as an original bill, &c. Those who are defendants to the original bill, and continued parties to the amended bill, need not be served with fresh process to appear to the amended bill; for having once appeared to the original bill, they are bound to answer the amended bill; but if any new parties are added to the amended bill, they must be served with new process, as to an original bill. And in 107, if a bill required to be amended before the defendant appears, it is done without costs; in like manner it may be amended after appearance, and before answer; and also after answer, provided, no further answer is required. And in 108, if the defendant puts in an insufficient answer, to which exceptions are taken, and they are either submitted to by the defendant, or allowed by

the court upon argument, in either of these cases the plaintiff may apply to the court for leave to amend his bill without costs, and that the defendant may answer the exceptions at the same time that he answers the amendments.

1 *Har. Ch. Pr.* 106, it is laid down, that after an appearance, if before answer, the plaintiff may move and obtain an order of course, to amend his bill without costs.

Wyatt's Pr. Reg. 66; if a further answer be required, then a *subpœna* to appear and answer amended bill must be served; and therefore, if amendment be made before any answer filed, the new process will be unnecessary.

These authorities are ample to show that no new *subpœna* was necessary to be served on *George* and *Mary Fitzhugh*, who had not answered the original bill.

They are also sufficient to prove, that no new *subpœna* was necessary on *Daniel*, who had answered, as no further answer was required. The only material allegation in the amended bill is, that it is surmised or pretended that the bond and agreement in the proceedings, were executed by *George Fitzhugh, the elder*, and not by *George, the younger;* and an interrogatory is framed for a discovery upon this point. Now the amendment was made on the statements in *Daniel's* answer to the original bill. So that no further answer upon the subject could be required for the purposes of the complainant or defendant. In strictness, perhaps, he ought to have received a formal notice of the amendment. But the case of *Woodhouse vs. Meredith*, 1 *Jac. and Walk.* 204, is in point to show that he has waived his right to insist on any such objection, by joining in the commission, and by taking testimony before the auditor, &c. and other proceedings in the case.

Nothing can be said of the form of the amended bill.

3. It is then said, the order, *pro confesso*, of the 19th December, 1833, was not served on *George Fitzhugh* and *Mary Fitzhugh*, before the 25th February, 1834, or at any other time.

This objection is colourable merely. The record is inaccurate in not setting out all the processes with their returns. But the decree, *pro confesso*, recites that the order, *pro confesso*, had been duly served—and it is presumed that recital will be as satisfactory here, as a copy of the order endorsed, served by some one who may profess to be a sheriff. This court has already decided, that a recital in the decree that the cause was standing ready for hearing, is sufficient to establish that fact, and it would seem that a like recital of service of the order would receive equal respect. *Rigden vs. Martin*, 6 *Har. and John.* 407.

4. That the order, *pro confesso*, gives the defendants time until the fourth day of December term, 1834, to answer; and yet the decree, *pro confesso*, is passed against them on the 11th April, 1834.

This objection is well taken in fact, and it is remarkable that such an error should have been committed, and more especially by a clerk, who is remarkable for his accuracy. Yet it is believed that the error is not fatal. The order requires the parties to put in a good and sufficient answer to the bill, or a plea or demurrer to the same, on or before the fourth day of December term next of this court, and requires the service to be made before the 25th February next ensuing the date of the order, which is 19th December, 1833.

This court will judicially notice, that several terms of the Chancery court intervened between the date of the order and the term, which was to be held in the ensuing December. The expressions of the order are, therefore, inconsistent. The ensuing December term was not the next term of the court. And the question is, whether we shall restore consistency by rejecting *December*, or rejecting *next*.

The court must take notice, that all the processes of the Chancery, like those of other courts, are issued and made returnable from term to term; and that the order, *pro confesso*, is a process issuing under the provisions of the act of 1799, ch. 79, sec. 2, which directs the chancellor, in case the defendant has been returned attached, to pass an order limit-

ing a day in the following term, on or before which the defendant must answer, &c. &c.; the act therefore required the time to be limited to the next term, and this court will assume that the court of Chancery intended so to frame its order, and more especially as the decree passed at the next ensuing term, expressly declares, that the defendants had failed to answer within the time limited by the order.

The defendants at this time were in contempt, and therefore are not entitled to the favourable consideration of the court. It will also appear, that they went before the auditor and took testimony in relation to the matters of account, and gave instructions in relation the account, and on the return of the accounts, the case was actually submitted in writing by the counsel for all the defendants. These facts prove they had notice of the decree, *pro confesso*, and suffered no injury from the inaccuracy of the order. If they were aggrieved by the decree and order, they ought to have moved to set them aside.

3. That there is no evidence that *William Cooke*, who assigned *Mrs. Dulany's* claim to *Thomas Buchanan*, was her attorney.

As the assignment was made over thirty years ago, and no objection has ever been urged against it, we might presume the authority of the attorney.

But this objection comes with a very ill grace from parties who prove they have made two, and allege they have made other payments to *Buchanan*, as assignee; who have permitted *Mr. Neth* to take an assignment from that first assignee, have settled an account with him, and made him sundry payments. It is precisely the requital which a man may expect for excessive lenity to his debtors.

The conclusive answer to the objection is, that the bill and the amended bill charges the assignments, and the decree, *pro confesso*, establishes that fact against *Mrs Dulany.*

It is then objected, that the decree is for the sale of all the lands mentioned in the proceedings, for the payment of the two sums of £230, and £400, with interest thereon, when

the complainants' own exhibit show, that *George Fitzhugh, the elder's* life estate in 500 acres, and his fee simple estate in 188 acres, were never charged or chargeable with payment of the debt of £400.

As *George Fitzhugh, the elder*, is dead, no question can be raised as to the liability of his life estate to be sold. That life estate is expired. The whole estate has vested in possession in *Mary, Daniel*, and *George*, the children—and it will not be pretended that their interest ought not to be sold.

Then as to the fee in 188 acres. The bill alleges, that on the 10th October, 1791, *George Fitzhugh, the elder*, conveyed to *Walter Dulany*, certain real and personal property in said conveyance, mentioned in trust, to secure the debt for £230. That afterwards the said *Walter Dulany* conveyed all the aforesaid real and personal property to *Mary Fitzhugh, George Fitzhugh, Jr.* and *Daniel D. Fitzhugh*. That on the 7th of April, 1805, the said grantees conveyed certain real and personal property, which is particularly described in the conveyance, to one *Rebecca Dulany*, and the said *Walter Dulany*, in trust, or by way of mortgage, to secure the debt of £230, and the debt of £400. That these two debts, and the mortgage last aforesaid, have been duly assigned to *Lewis Neth*. That on the 2d April, 1822, these mortgagors came to a settlement with *Lewis Neth*, and executed to him their bond for the balance due, and on the 26th January, 1825, they executed a further deed or agreement, whereby it is declared, that the bond of 1822, was given to secure the principal and interest remaining due on the debts secured by the mortgage, and that the sum secured, to be paid by the bond, was a continuing charge on the mortgaged property.

The language of this last instrument, which is the complainants' exhibit D, is conclusive, to show that the parties to that instrument admitted the right of *Mary, Daniel*, and *George, Jr.* to mortgage the property, which is mentioned in the deed of 1805, and that *all* the debts thereby provided for, were well charged on *all* the property mentioned therein, and thereby *intended* to be conveyed. If, then, the averment in

Daniel D. Fitzhugh's answer, and the proofs offered on behalf of all the defendants before the auditor be credited, viz: that the instrument was executed by *George Fitzhugh, the father*, and not by the son—we shall have the father's conclusive admission, that the title to all the property mentioned in the deed of 1805, was, at the time of its execution, well vested in the mortgagors, and that they had authority to charge the same.

But if that averment and proof should be excluded, and if it should be taken that the bond of 1822, and deed or agreement of 1825, were executed by *George, the son*, the same presumption of title may be made from other circumstances—such as the relation of father and children, which subsisted between those parties—the very great probability, that the father had notice of the deed from *Walter Dulany*, to his children, and of the mortgage from his children, to *Rebecca* and *Walter Dulany*, and his acquiescence in these conveyances for more than 30 years, during which, the debts had been passed by two separate assignments.

Nor is it to be overlooked, that the deed from *George Fitzhugh, the father*, to *Walter Dulany*, is not a mortgage, but a trust to sell absolutely for payment of debts. Nor is there any apparent consideration for the deed of 1805, which charges the father's debts on the estate of the children, unless it be affirmed that under the deed from *Walter Dulany* to them, with the father's assent, they had acquired all the residuary interest in the father's estate; upon the whole state of the case it is submitted as a fair inference, that the father finding himself irretrievably involved, had assigned all his property to his children, on their undertaking to discharge his debts. Upon this hypothesis their right to make the mortgage of 1805, would be unquestionable.

But it is to be observed, that *George Fitzhugh, the father*, is dead, and that his heirs, *qua heirs*, are not here objecting to this decree, as burthening unjustly his estate. The objection comes from his children, the mortgagors, who pretend that they had no title to the lands which they undertook to

convey in 1805! Can *they* be permitted to impeach their own deed, upon the ground of a defect in their own title.

If the surviving appellants think their case can be improved by their assuming the relation of heirs at law of the father, we will recognize them as parties in this character, and we believe that in point of fact, they are entitled to assume that character. Upon this assumption, the former right of the father will have devolved on them. And they will now have the title which they professed to have in 1805, and which they professed to convey by the deed of that date. Can they set up this after acquired title to defeat their own conveyance. As between the grantee and a stranger, it may be true, that the deed passed no more than the title, which the grantors had at the time of its execution. But as between the grantors and grantees, the deed itself is conclusive as to the title, and as to conveyance of title, and *estops* the party grantors from denying title, &c. or setting up an inconsistent title.

If we turn to the answer of *Daniel Fitzhugh*, we shall find admissions of every fact material to our recovery, and he does not rely on defect of his title to avoid his own act. Can he rely on a defence which he has not put in issue by his answer.

The bill has been taken, *pro confesso*, against the other defendants to the bill. Every thing in the bill is, therefore, admitted by them. Now the bill alleges, that the father conveyed certain property to *Walter Dulany*, that *Walter Dulany* conveyed the same property to the children. That the children made a conveyance to *Rebecca* and *Walter Dulany*, and by referring to the deed, which is part of the bill, we find it includes the very property which the children had acquired from *Walter Dulany*, and the bill charges the right of the complainant to have his debt raised out of the whole estate. If all the facts charged in the bill had been admitted to be true, could the defendants afterwards have relied on their defect of title? And has not the statutory confession the same effect precisely as an express admission.

7. This point assumes as a preliminary, that the father had a fee in 188 acres, and an estate for life in 500 acres, and the

reversion of this 500 acres was in the children. And hence concludes, that the bond of 1822, and agreements of 1825, are ineffectual, unless it can be shown that the father and all the children were parties to these instruments.

If the argument on the last preceding point, has succeeded in convincing the court, that in point of fact, the whole title of the father was vested in the children in 1805, or has since devolved on them, or that upon the present state of the proceedings, no question can be raised as to the title of the parties to the deed of 1805, then it will result that the assumption of fact is gratuitous, and the conclusion will be unwarranted.

The bill charges, that the bond and agreement were executed by *all the children*—the amended bill suggests the pretence, that they were executed by *George, the father*, and not by *George, the son*, but relies on the original charge. The bill is taken, *pro confesso*, against the father, *George, the son*, and *Mary*, and consequently they admit the execution of these papers by all the children.

Daniel, in his answer insists, that these instruments were executed by the father, but on general replication and issue, he fails to make out this point. He admits his own liability, and therefore shows he has no *interest* in denying that which *George, the son*, (the party to be charged,) has confessed.

But it may be argued, that after the cause was sent to the auditor, the defendants proved the instruments were executed by the father, and not by *George, the son.* In the points annexed to the appellee's statement, it has been already objected, that this evidence is inadmissible. At present, therefore, it will be sufficient to say, that if it is considered as evidence offered by *Daniel* or *Mary*, it is inadmissible, because they have no interest in showing the fact, and if it is considered as offered by *George, the son*, it is inadmissible, because it would contradict that which he has previously confessed on the record.

But if the evidence be admitted, it will show that the father, *Daniel* and *Mary*, executed, and are therefore bound

by the agreement of 1825. And that agreement admits the debts are properly charged on all the property conveyed by the deed of 1805.

Then if we turn to the mortgage of 1805, we shall find it was executed by *George, the son*, and we shall find endorsed on the bond of 1822, credits for certain payments made by *the son*, on account. *Of* these payments, all the defendants have claimed benefit before the auditor. The bond is therefore adopted as a settlement by the son, and binds as firmly in equity as if he had executed it.

8. The representatives of *Walter Dulany*, are parties to the amended bill. And a decree has been passed against them.

The points already filed, state the grounds on which it is supposed that *Upton Scott* is not a necessary party.

9. It would seem to be conceded by this point, that as between the parties; mortgagor and mortgagee, a conversion may be made of the interest into principal; and that the only question to be agitated is, whether such conversion can be made to the injury of a subsequent encumbrancer?

The answer to this view of the objection is short. It does not appear that the *Bank of Maryland* acquired its mortgage before the date of the bond of 1822. The bank does not by its answer complain of that settlement—nor is it shown or alleged that the settlement will operate to the prejudice of the bank.

If it be intended to agitate the general question of the lawfulness of a conversion as between debtor and creditor, it will be submitted that the affirmative side is conclusively established by the authorities. Interest *already* accrued may be converted into principal, although a prospective agreement will not be enforced.

The printed statement already submitted will explain the principles which were adopted by the parties in their settlement. The interest due at the time of the assignment from *Mrs. Dulany* to *Mr. Buchanan*, was converted into principal. And like conversion took place at the time of the assignment,

by *Mr. Buchanan* to *Mr. Neth*, and at the time of the settlement with *Mr. Neth*.

If the parties to be charged, joined in or assented to this conversion of interest into principal, the right of the assignee to claim the compound interest will be clear. And it is clear that *George*, *the son*, if he did not execute the bond and agreement did confirm the same by the endorsements of payments made by him on account.

But if his acquiescence was doubtful, it would not be difficult to show that under all the circumstances, the claim for the compounded interest ought to be sustained.

In 1665, *Ld. Clarendon* decided that on an assignment of a mortgage, all moneys really paid by the assignee, that were due to the mortgagee, should be principal to the assignee. 1*st Chan. Ca.* 67, *Smith vs. Pemberton.*

It is conceded in this case that *Mr. Neth* gave full value for this mortgage.

In *Porter vs. Hobart*, 2 *Cha. Rep.* 441, 3 *Cha. Rep.* 43, *Ld. Bridgman* decreed, that interest should be converted into principal for an assignee—that is, that he should have interest on the whole sum advanced by him. This decree was reversed by *Ld. Shaftbury*, in 1672.

It will be found that the peculiar circumstances of this case which commended the mortgagor to the political sympathies of *Ld. Shaftbury*, are the grounds for reversal. In all subsequent cases it is treated as the *first* and *only* case in which an assignee was refused interest on the whole amount of his advances.

Thus, in 1674–5, *Ld. Notingham* declared it was always the rule that the mortgagee assigning, the assignee should have interest for the interest then due, and it *never* was contradicted but in *Porter vs. Hobart.* 1 *Chan. Ca.* 258 *Anon.* 1 *Vern.* 168, *Earl of Macclesfield vs. Fitten*, decided by *Lord North* in 1683. 2 *Vern.* 135, *Gladwyn vs. Hinchman*, by *Ld. Com. Maynard* in 1689, are to the same effect.

In 1745, *Ld. Hardwicke* affirms the same rule, with this qualification, that the assignment be made with the *concur-*

rence of the mortgagor. His consent to have interest converted into principal is unnecessary. *Arhenhurst vs. James*, 3 *Alk*, 271.

In 1 *Johns. Ch. Ca.* 15, *Ch.* inclines to the same opinion. It is remarked on this case that *Ch. Kent* formed his opinion in a great measure on the case of *Macclesfield vs. Fitten*, as reported in the old edition of *Vernon*—from which it would seem that the question was adjourned over. A new edition with notes by *Mr. Raithby*, has been since published, in which it is shown from the *Register's Book*, that the case was actually decided in favour of the assignee, and *Ld. Keeper North* declared the like rule should prevail in all future cases.

10. This point may be disposed of with two short remarks.

1. If the bill was multifarious the defendants ought to have demurred.

2. That in truth the relief is claimed on the second mortgage alone.

Dorsey, Judge, delivered the opinion of the court.

The appellants' first ground assigned for the reversal of the chancellor's decree is, that there is no evidence in the cause to sustain it, because, as is alleged, the commissioners did not take the oath annexed to the commission, and their proceedings under the commission are therefore null and void. Had this objection been taken by an exception filed at the proper time in the chancery court, it would necessarily have been considered and determined by the chancellor, and his determination would have been a fit subject for review in this court. But the question as now presented by the record is, by the 5th section of the act of 1832, ch. 302, excluded from our consideration. That section enacts "that hereafter in all causes in the court of chancery or any county court as a court of equity, all objection to the competency of witnesses, and the admissibility of evidence, and to the sufficiency of the averments of the bill or petition, shall

be made by exceptions filed in the cause, and no point relating to the competency of witnesses or to the admissibility of evidence, or the sufficiency of the averments of the bill or petition, shall be raised in such causes in the court of Appeals, or noticed, or determined, or acted on, by the court of Appeals, unless it shall plainly appear in the record that such point had been raised by exceptions as aforesaid in said court of chancery or county court." It is true that the defendants more than a month after the passage of the decree did file a series of objections to it, one of which was, that now relied on against the admissibility of the evidence taken under the commission. But such a proceeding was wholly irregular, and cannot be regarded as in any wise relieving the defendants from the effects of the prohibitory enactment of the above mentioned section. The manifest design of the legislature was, that all objections to the admissibility of evidence should be taken by exceptions filed in the cause before the passage of the decree, that the chancellor whilst decreeing, might have them in view, and that the opposite party might resort to the appropriate means of obviating their effects, whilst the cause continued before a tribunal where such resort could be had.

The *second* ground of reversal to wit: because it does not appear from the record that the defendants in the original bill were summoned to answer to the amended bill, is equally unsustainable. When the amended bill was filed, none of the defendants had answered, save *Daniel D. Fitzhugh*, who, in his answer to the original bill had fully responded, as to all the matters in the amended bill by which his interest could be affected. To have required of him a second answer, would have been such an act of supererogation, as is never imposed upon its suitors by a court of equity jurisdiction. As regards the other defendants to the original bill they were called upon by the amended bill simultaneously to answer both. Such a call we deem sufficient, and no valuable result could have been obtained by the issue of new subpœnas.

The *third* ground is because the order, *pro confesso*, of the 19th December, 1833, was not served upon *George Fitzhugh* and *Mary Fitzhugh* by the 25th *February*, 1834, or at any other time. This we think equally untenable. In the absence of all direct proof to the contrary, we regard the statement of the chancellor in his order of the first of April, 1834, "that the above mentioned order had been duly served," sufficient evidence of the truth thereof. *Rigden vs. Martin*, 6 *Har. and John.* 407.

The *fifth* ground asserts that there is no evidence that *William Cooke* who signed the assignment to *Thomas Buchanan* as attorney for *Rebecca Dulany* was the attorney of *Rebecca Dulany*. Such an objection comes with an ill grace from the defendants under the circumstances of this case. The assignment was made in 1806. It has been acquiesced in, and recognized by the appellants from that time, until the filing of their notes in this court, a period of more than thirty years. They have for about twenty-five years continued time after time, to pay to the said assignee and those claiming under him interest due on the debts assigned. *Daniel D. Fitzhugh*, one of the appellants, in his answer in express terms admits the assignment of the debts due to the said *Rebecca Dulany*, to *Thomas Buchanan;* and three of the four appellants, by a bond and agreement under their hands and seals, the first dated in 1822, the second in 1825, by necessary implication, and also in the said agreement in express terms admit the assignment and its validity, and in like manner make the same admission in 1835, in their instructions to the auditor to state the accounts. And they exhibit and claim credit for a receipt given in 1808, by *Thomas Buchanan*, (and which has been allowed to them) in which this assignment is expressly stated. In addition to all this, a decree, *pro confesso*, has been entered in this cause against *Rebecca Dulany* and her representatives, by which she admits all the allegations in the appellee's bills, one of which is the assignment of the said mortgage debts of the said *Rebecca Dulany*. Under circumstances like these to

compel the appellee to produce further proof of the validity of the assignment in question, would be a departure from the settled doctrines of a court of equity, and at war with the dictates of reason and common justice.

The *sixth* ground assigned is "because the decree is for the sale of all the lands mentioned in the proceedings for payment of the two debts of £230 and £400 added together and interest compounded thereon; when complainants' exhibits A and B shew that the life estate of *George Fitzhugh, the elder*, (who held a life estate in 500 acres) and his fee simple estate in 188 acres never were charged or chargeable with payment of the debt of £400. To this objection it is only necessary to refer to the aforesaid bond and agreement of 1822 and 1825, in the latter of which the said *George Fitzhugh, the elder*, ratifies and confirms the said mortgage of 1805, and makes as far as he is concerned, the land and premises therein mentioned, including both his said life and fee simple estate, liable for the debt for which the chancellor has decreed its sale.

We do not concur with the appellee's counsel, when they insist on the rejection of *Samuel Ridout's* testimony, as having no relation whatever to the matters of account referred to the auditor, nor do we believe it to be the interest of the appellee that we should do so; but for the proof that the bond and agreement of 1822 and 1825, were executed by *George Fitzhugh, the elder*, it is not easily discoverable from the record how his life estate in the 500 acres, or his fee simple in the 188 acres, can be charged with the debt of £400, on the compound interest thereon and on the £230 debt. But for this proof the auditor's statement No. 5, could not be sustained as against *George Fitzhugh, the elder*, nor could the decree of the chancellor predicated upon it, share a better fate. The accounts between the parties, the charges upon the respective mortgaged estates of the several appellants, could not have been correctly stated by the auditor until the facts established by *Ridout's* testimony were laid before him. The order of the chancellor

therefore was in this respect a sufficient warrant for the acts of the auditor.

The *tenth* ground upon which a reversal of the decree of the chancery court has been claimed is, " because exhibits A and B, being conveyances of different estates, by different parties, at different times, to secure (in part) different debts, ought to have been the subject of separate and distinct bills, and could not properly be embraced by one. There is no weight in this objection. The chancellor could not have decreed definitively in reference to the mortgaged premises or any of the rights of the respective parties upon any other bill than that which embraced in it, all the conveyances. Had the bill been filed only upon the deed of 1791, and the defendants in their answer had set out the deed of 1805, the complainant would have been compelled to amend his bill, and introduce into it the latter conveyance, and had the respondents then have set out the bond of 1822 and agreement of 1825, the complainant must again have asked leave to amend his bill to charge in it, the execution of such bond and agreement.

The correctness of the decree therefore stands unimpaired by any thing alleged in the first, second, third, fifth, sixth, and tenth grounds, on which, its reversal has been insisted on; but under the present proceedings and proofs in the cause it cannot evade the force of the fourth, seventh, eighth, and ninth objections.

The fourth is because the said order, *pro confesso*, (meaning the order of the 19th December, 1833,) gives the defendants until the 4th of December, 1834, to answer the bill, and yet a decree, *pro confesso*, was passed against them on the 1st day of April, 1834. To have made absolute the order, *pro confesso*, as was done on the 1st day of April, 1834, the chancellor must have been satisfied that the order of the 19th of December had been served upon the defendants, and that they were knowingly guilty of a default in not filing their answer within the time limited by the order. It is true that a solicitor in chancery, knowing the terms of the

Chancery court to be held in *March*, *July*, *September*, and *December*, and that by the second section of the act of assembly of 1799, ch. 79, the chancellor was not authorized to fix a day for the filing of the defendants' answer, beyond the ensuing March term, would contrary to the natural import of its terms have understood the order as fixing the time for filing the answer on or before the 4th day of *March*, next term, instead of on or before the 4th day of *December* term next, yet it would be unreasonable and inconsistent with the principles of equity and justice to impute to an uninformed suitor, the same knowledge and understanding, to visit on him the sins of a wilful defaulter, and to punish him accordingly. We think therefore that the order, *pro confesso*, of the 1st of April, 1834, was erroneously passed, and can give no support to the decree in this cause.

The point raised by the appellants' seventh ground under the insufficient proofs taken in the cause cannot be resisted. To bind the interest of *George Fitzhugh, junior*, in the mortgaged premises for the interest compounded at the dates of the assignments of the mortgage debts to *Buchanan* and *Neth*, his concurrence in the making of such assignments must be proved, or his subsequent ratification of, or assent to such compounding must be shewn—he cannot infer it solely from the credit claimed from exhibit E, because the payments on which those credits rest do not appear from any testimony in the record to have been made by him, or with his knowledge or approbation. Had the appellee have proved (as doubtless he could have done) the truth of the endorsements of payments made on the bond of 1822, the difficulty in question would have been effectually obviated.

The eighth ground is, because the legal representatives of *Walter Dulany*, deceased, mentioned in complainant's exhibit A, and *Upton Scott*, or his legal representatives are parties in interest, and should have been parties to the cause. The debt due to the representatives of *Walter Dulany* having since the deed of 1791 been of more than forty years standing, and there being in the record nothing to show such a con-

tinuance, revival, or recognition of that debt, as would render it a subsisting lien upon the mortgage premises or any part thereof, and the appellee having in his bill of complaint alleged, that the said debt was paid and discharged; we think the presumptive bar from the lapse of time, is so conclusive against their claim, that it was not necessary that the appellee should have made them parties to this suit. But *Upton Scott*, or his representatives stand in a very different situation. *Daniel D. Fitzhugh*, one of the mortgagors, in the deed of 1805, explicitly admits in his answer, the present existence of *Upton Scott's* debt. Such admission although it does not so far revive the debt as to make it available, when in conflict with the claims of the appellee, does operate to remove the presumptive bar from length of time so far as the rights of *Daniel D. Fitzhugh* are concerned, and restores it to full life as an effective lien on all such interest of *Daniel D. Fitzhugh* in the mortgage premises as may remain after satisfying the claim of the appellee. *Upton Scott* then, if living, or his representatives in the event of his decease, have such an interest in the mortgage premises, that as parties to these proceedings they should have an opportunity of asserting and protecting their rights.

The 9th ground which is relied on by the appellants, for reversing the decree is thus stated, because the mortgagors cannot by any agreement compound the interest on the principal debt, and render the whole a charge upon the lands to the prejudice of those whose debts are secured by the same mortgage, and of the *Bank of Maryland* a subsequent mortgagee. The first branch of this proposition has not been, and cannot be contended for, if by debts secured by the same mortgage, is meant debts which are subsisting liens upon the mortgaged premises and are obnoxious on the part of the plaintiff, if otherwise conflicting with his claims, to no other bar to their recovery, than that arising from the compounding of interest. But the last branch of the proposition (as to the rights of the *Bank of Maryland*,) involving in its consideration some important principles of law, as yet unsettled in

Maryland, not appearing to have been decided by the chancellor and its decision neither tending to the affirmance or reversal of his decree, we mean to express no opinion upon it.

The proceedings in the cause have not as yet reached that state of maturity, which they must obtain before that question is presented for adjudication. The decree as respects the conflicting claims of the parties upon the mortgaged premises makes no decision; it simply orders a sale of the property, and that the proceeds be brought into court for distribution. *Non constat* that as between such claimants there will be any conflict; the mortgaged premises may sell for enough to satisfy all the liens upon it. In the event of its not doing so, when the auditor has stated the account distributing the fund, and not before, will the chancellor be called on to adjudicate upon the rights of the claimants.

It appearing to this court that the substantial merits of the cause will not be determined by the reversing or affirming of the decree of the chancellor, and that the purposes of justice will be advanced by so doing, it is thereupon this 22d day of December, 1837, ordered and adjudged by the authority of this court, that this cause be remanded to the court of Chancery, for the purpose of amending the pleadings, making *Upton Scott*, if living, or if dead, his legal representatives, a party or parties defendant, and that such further testimony be taken therein, and other proceedings had under the chancellor's direction, as shall be necessary for determining the cause upon its merits.

CAUSE REMANDED TO CHANCERY.

Thomas Hope, *adm'r of* Hannah Hope *vs.* Thomas Hutchins.—*June*, 1837.

When the donor of personal property declared in the deed of gift, that she should not be debarred or prevented from holding, using, or enjoying the property granted, and all profits arising therefrom during her natural life, this reservation does not qualify the absolute character of the grant except only so far as to enable the donor to use either the subject granted, or *its increase* during her life, though the donor remained in possession till her death.

In all cases of contracts, deeds, and wills, the intention of the parties shall prevail as a rule of construction unless it violates some established principle of law.

Appeal from *Harford* county court.

This was an action of *Replevin* commenced on the 8th day of May, 1833, brought by *Thomas Hutchins* against the appellant for the following negro slaves, to wit: *Mary*, *Ann*, *Joshua*, *John*. The slaves were replevied and delivered to the plaintiff as per the schedule returned with the writ in this cause.

The case was submitted to the county court upon an agreement and statement of facts. "The defendant's intestate, *Hannah Hope*, executed and delivered to the plaintiff, *Thomas Hutchins*, a bill of sale dated August 21, 1818, for and in consideration of the love and affection which she, the said *Hannah Hope*, doth bear unto the said *Thomas Hutchins* and *Lovisah Hutchins*, his wife, the daughter of the said *Hannah Hope*, and for the better maintenance, support, and preferment of them, the said *Thomas Hutchins* and *Lovisah Hutchins*, his wife, of a negro girl, named *Betty*, two cows, and all the household furniture of which she, the said *Hannah*, may be possessed of at the time of her decease—*provided the said Hannah Hope shall not be debarred or prevented holding, using, and enjoying, the said property above as aforementioned, and all profits arising therefrom during her natural life;* and the said *Hannah* did give and grant and confirm the said property unto the said *Thomas Hutchins*, his heirs and assignees, under the proviso, restrictions and limitations

above mentioned, to take and enjoy, to use or dispose of to him, the said *Thomas Hutchins*, his heirs or assigns, to his or their use and benefit, and to no other purpose or use whatsoever. This instrument was duly acknowledged and recorded. The negroes claimed were the children of *Betty*, born after the execution of the bill of sale, and during the life time of *Hannah Hope*. *Betty* and her children remained in the possession of *Hannah Hope* to the time of her death.

Upon these facts the county court (*Archer, Ch. J. and Purviance, A. J.*) were of opinion that the legal estate in negro *Betty* passed to the grantee, at the time of the execution of the deed, and that the reservation in favor of the grantor, only operated as a covenant to permit the grantor to use *Betty* and her children (the profits) if she pleased so to do, that, in this respect the case differs from the decided cases of *Dobson and Scott, &c.* and therefore rendered judgment for the plaintiff in replevin, to be retained by him irrepleviable for ever.

The defendant, *Thomas Hope*, administrator of *Hannah*, brought up the cause by appeal, and it was submitted on written notes to Stephen, Dorsey, and Chambers, Judges.

By O. Scott, for the appellant.

Constable, for the appellee.

Stephen, Judge, delivered the opinion of the court.

We think that the judgment rendered by *Harford* county court in this case was correct, and ought to be affirmed. It is a rule of reason and justice, as well as a well settled doctrine of our jurisprudence, that in all cases of contracts, deeds, and wills, the intention of the parties shall prevail, unless it violates or infringes some established principle of law. The language of the deed, upon the construction of which the controversy in this case arises, is, we think, too plain and explicit to admit of doubt or difficulty in ascertaining its true meaning, or legal effect and operation. It is most clear, plain, and palpable, from the terms of the instru-

ment itself, that the legal title, upon its execution, immediately passed to the grantee, and that nothing more than a mere usufructuary interest, or right of enjoyment, was intended to be reserved by the grantor, in relation, either to principal or profits. It was obviously her design to make a beneficial provision for her daughter, who was the wife of the grantee, reserving to herself, at the same time, the use of the property and its profits, for her life only, in case her necessities should require it. The reservation is express, that she was not to be debarred or prevented from holding, using, and enjoying, the said property and all *its profits during her natural life.* Upon the most favourable construction which can be given to this deed for the appellant, his intestate could only take a life interest in the children, considering them as a part of the *profits*, in which light they are considered by the decisions of this state, and which give them to the tenant for life, when born during the continuance of his life estate; but it is manifest from the terms of the instrument, that she intended to appropriate and carve out for her own use, no greater interest in the *profits* than she had reserved in the *principal* articles, from which the profits were to be derived; and it is not understood to be denied, or questioned, that upon her death, all her interest in the labour and services of the mother, immediately ceased and terminated. We do not think that the decisions of the courts of this state referred to by the appellant in his argument, have any bearing upon the merits of this controversy. In 4 *Dallas*, 347, *Patterson, Justice*, in delivering the opinion of the circuit court for the *Pennsylvania District*, says, "the great rule of interpretation, with respect to deeds and contracts is, to put such a construction upon them, as will effectuate the intention of the parties, if such intention be consistent with the principles of law. This rule of construction, as we have before remarked, is the polar star by which courts of justice are governed in their judicial interpretation of such instruments, and in this case, the terms used by the donor, so clearly and forcibly express her intention, that we think

the deed can admit of but one construction only, which is that her usufructuary interest in the mother and her children ceased upon her death, and that they then passed to the appellee in full and absolute property. The decisions of *Scott vs. Dobson*, and *Somervill vs. Johnson*, cited in the argument, do not apply to this case. They are cases where property in the female slaves was vested in the tenant for life; but in this case the property was transferred by the deed immediately to the appellee, and nothing more was reserved than a limited and temporary right of user, which expired upon the death of the donor. If she had intended to reserve to herself a title to the profits, instead of stipulating for the *use* of them in common with the principal property from which they were to be derived, she would have employed language more appropriate to carry that intention into effect; but in the reservation which she makes of a right to their use and enjoyment during her life, they are placed upon the same footing with the principal articles specifically enumerated, and upon her death passed with them to the appellee. We think therefore that the judgment of *Harford* county court was correct, and ought to be affirmed.

JUDGMENT AFFIRMED.

WILLIAM D. CLAGETT AND CHARLES HILL *vs.* RICHARD AND HENRIETTA M. HALL.—*June*, 1837.

The testator directed that the whole of his estate should be kept together for the payment of debts. He then devised certain lands to his son in fee, and certain *other* lands to the same son and another, in fee, in trust, for the separate use of his daughter (a feme covert) and her children, and authorized the trustees to sell the trust estate in case they deemed it proper. On the day of the execution of the will, the testator conveyed to his son the lands mentioned in the devise to him. Held, that if the conveyance was made under the especial trust and confidence that the grantee should pay the debts of the testator, it would be a revocation of the first mentioned clause in the will—and the fact that the trustees had sold the land devised to them would be evidence that the testator's debts had been paid. Hence

under such allegations the *c. q. t.* need not allege, to entitle her to relief, claiming the execution of the trust, that the debts of the testator had been paid.

Where a deed is charged to be fraudulent, or a secret trust to be its real consideration, and when the consideration recited in it has *not* been disproved, evidence of collateral circumstances, showing an additional consideration not expressed in the deed, may be received to repel the fraud or the secret trust.

Where evidence taken in the court of chancery has not been made the subject of exception under the act of 1832, ch. 302, sec. 5, objections to its competency are excluded from the consideration of this court.

Where it is not alleged or proved, that by fraud, surprise, or mistake, a clause converting an absolute deed into a deed of trust, was omitted to be inserted, it would be inconsistent with the best established principles of the law of evidence, to add a new and important clause, altering the terms of such deed, by the admission of parol evidence showing that such a trust was attached thereto.

It is error to decree payment of the proceeds of the separate estate of the wife to herself and her husband, in opposition to the prayer of the bill for relief, though husband and wife are complainants.

A devise in fee to trustees for the use of the daughter of the testator and her children, with directions that the trustees shall not be compelled to pay into the hands of the husband of the daughter any part of the proceeds of the land, but that the same shall remain in the hands of the trustees during the life of her husband, with power to the trustees to sell the trust estate. The trustees having sold, upon a bill to reinvest and enforce the trust the children of the daughter are not necessary parties. As far as the rights of the children are concerned, the will vests the property absolutely in their mother.

When two are appointed trustees and executors of a will, and one of them renounces, he cannot be made chargeable with a breach of the trust by the other—no proof being adduced that the renouncing party ever received any portion of the trust fund.

When the proceeds of a trust estate are enjoined in the hands of an agent of the trustee appointed to collect, and both principal and agent called upon to bring the money into court, the principal is not ordinarily bound to pay interest during the continuance of the injunction.

A trustee acting improperly with trust funds may be compelled to bring them into court before the time at which, under other circumstances, he would be bound to pay them to the *c. q. t.*

A defendant in a chancery cause cannot be examined as a witness without an order of the chancellor to that effect.

One who has purchased a part of the real estate of a deceased party, in a controversy intended to establish a secret trust as affecting a conveyance of such deceased party, by which the grantee agreed to pay the grantor's debts, is not a competent witness to establish such secret trust, as he thereby provides a fund for the payment of debts, and so far exonerates his own purchase.

When the substantial merits of an equity cause will not be determined by reversing or affirming the decree of the court of chancery or the purposes of justice advanced by doing either, this court remanded the cause to amend the pleadings, make new parties, state further accounts, and take such further testimony as may be necessary.

APPEAL from the court of *Chancery*.

Joseph W. Clagett, of *Prince George's* county, by his last will and testament, executed on the 17th April, 1828, and admitted to probat on the 1st May, 1830, declared among other matters as follows:

"It is my will and desire, and I do hereby will and direct that the whole of my estate, both real and personal, be kept together by my executors, until all my just and lawful debts, funeral expenses and cost of administration are fully paid and satisfied."

The testator then devised in fee to his son, *William D. Clagett*, the land on which "I now reside and all the land that lies contiguous and adjoining thereto"—farming utensils and stock on said land, at testator's death—certain negroes—all the household and kitchen furniture and plate, also as follows:

"*Item*, I give and devise unto my daughter, *Susanna Maria Hill*, half of my lands in *Calvert* county, to her and her heirs for ever," and certain negroes, &c.

"*Item*, I give and devise unto my son, *William D. Clagett*, and my son-in-law, *Charles Hill*, and their heirs for ever, one-half of all my lands in *Calvert* county, in trust, and to and for the use and benefit of my daughter, *Henrietta Maria Hall*, and her children; and my will and desire is, that the said trustees shall not be compelled to pay into the hands of *Richard Hall*, the husband of the said *Henrietta Maria Hall*, any part of the proceeds of the said land, but that the same shall remain in the hands of the said trustees during the life of the said *Richard Hall*, and payments to my daughter *H. M. Hall*, shall be sufficient to discharge said trustees. And I do hereby authorize and empower the said trustees, to convey the said land (*in case they should think proper to sell*

the same) to the purchaser or purchasers thereof by a good and sufficient deed or deeds.

"*Item*, all the rest and residue of my personal estate, I will and direct, shall be equally divided into two parts; one part thereof I give to my daughter *S. M. Hill;* and the other half to my son, *W. D. Clagett*, and son-in-law, *C. Hill*, and their heirs, in trust, to and for the use and benefit of my daughter, *H. M. Hall*, and her children; with like provisions as to her husband and payment to be as before, and I do hereby authorize and empower the said trustees to sell and dispose of the said *personal* property, and to vest the proceeds of *such sale* in other property, or bank stock, if the said trustees shall think it most advantageous so to do."

The testator then appointed *W. D. Clagett*, and *C. Hill*, his executors.

By a deed executed on the 17th April, 1828, (the day of the execution of the will, the testator,) *Joseph W. Clagett*, "as well for and in consideration of the natural love and affection which he, the said *Joseph W. Clagett*, hath and beareth unto the said *William D. Clagett*, also for the better maintenance and support and preferment of him, the said *Willian D. Clagett*, and also for and in consideration of the sum of five dollars, &c. conveyed unto *William D. Clagett*, in fee, all the lands and personal property mentioned in his last will and testament, with a covenant for quiet enjoyment and warranty from all persons claiming under the grantor.

On the 25th November, 1832, *Richard Hall*, and *Henrietta*, his wife, filed their bill in chancery, which was subsequently amended, charging that on the day of the execution of the said *J. W. Clagett's* will, that the said *W. D. Clagett*, obtained from the testator, a deed of conveyance of all his property, except a tract of land in *Calvert* county, that said deed was obtained by fraudulent pretences, and undue influence; and also that it was made under the special trust and confidence, that the said *W. D. Clagett*, should pay the debts of the grantor; that *W. D. Clagett*, sets up the deed as a revocation *pro tanto* of the will, and is endeavouring to

divert the fund intended for the benefit of *Henrietta M. Hall*, the complainant, and her children, to the payment of the debts of the testator, contrary to the intention of the testator, and in violation of the said *W. D. Clagett's* contract with *J. W. Clagett*. That the land conveyed to *W. D. Clagett*, by the deed of April, 1828, with the assets which came to the hands of *W. D. Clagett*, are more than sufficient to pay the debts of *J. W. Clagett*. That the land devised to the executors of *J. W. Clagett*, in trust for complainant, were sold in January, 1831, for $3,328.64—that the purchaser gave his bond for the same—and that since the sale, *James Kent*, the purchaser has assigned to the said *W. D. Clagett* certain bonds, notes, and accounts, due by certain persons to him, to be applied when received, in satisfaction of said *Kent's* bond to said *W. D. Clagett* and *C. Hill*—that the said bonds, notes, and accounts, are in the hands of a certain *Vernon Dorsey, Esq.* That the said *W. D. Clagett* hath assigned the said bonds, notes, and accounts, to the said *Charles Hill*, who had notice of complainant's claim, to secure the payment of a debt due by *W. D. Clagett* to *Charles Hill*, or to indemnify the said *Charles Hill* against some liability incurred by him on account of *W. D. Clagett*. That such assignment is fraudulent and void, and that said *Charles Hill* is responsible for the whole of the fund, or such part as he has received. The bill then claimed a discovery of the bonds and notes so assigned and amounts due, and an injunction to prevent *Hill* and *Clagett* from receiving, and *Vernon H. Dorsey* from paying to them any part of said bonds, and that they should bring the sums in hand into court; prayer for *subpœna* against *Clagett*, *Hill*, and *Dorsey*, for an execution of the trust and for general relief.

The answer of *William D. Clagett* denied that he ever claimed title except under the deed to him from *J. W. Clagett* —all fraud—and undue influence; and charged that he gave a valuable consideration, to wit: 226 acres of land devised to him, called *Melwood*, by *Susanna Maria Digges*—that she also bequeathed to him a number of negroes, of which *J. W.*

Clagett had the use of for eight or ten years, and the proceeds of their labour applied in payment of his debts—that *J. W. Clagett* owning also a part of *Melwood*, united with this defendant in conveying it to his son-in-law, *Benjamin H. Clarke*, in exchange for the lands in *Calvert* referred to in the bill—that the defendant sold his negroes and applied the proceeds, $2,350, in payment of *J. W. Clagett's* debts—that he paid also $2,000, and for one of the negroes conveyed to him by *J. W. Clagett*, gave him another—that as executor he did not return an inventory of any part of the property devised to him. The answer then denied that the deed of *J. W. Clagett* was made in trust to pay debts of the grantor, or that the defendant had agreed to pay them—that no negroes devised to *H. M. Hall* were ever delivered to her, though three of them were suffered to remain in her service, as she was needy and his sister, and he did not desire to deprive her of their services as long as he could avoid it. The answer admits the sale of the lands to *James Kent*, the receipt of his bond, and the assignment of securities delivered to *Vernon H. Dorsey, Esq.* to be collected and applied to the payment of the purchase money. That shortly after the land was sold, being anxious to raise a sum to pay off the judgments against *J. W. Clagett*, he applied to *C. Hill*, to negotiate a loan for him, who became his security, and obtained for him from the *Bank of the Metropolis*, a loan of $5,000, and from individuals, a loan of $3,000; which sums were applied to *J. W. Clagett's* debts; that he did not assign *Kent's* notes or securities to him, *Hill*, but executed to him a mortgage of land and negroes. That at the time the loan was effected, the defendant agreed with the *Bank of the Metropolis*, that as the money was collected on the bonds and notes in question, it should be paid to the bank, in satisfaction of the loan made by it; and sometime afterwards, that institution made *Charles Hill* its agent, to collect the same, and in that character he gave said *Hill* an order on *V. Dorsey*, to receive the money as collected on said bond, he denies any assignment of the bonds, &c. to said

Charles Hill. That one-half of the purchase money of the land has thus been paid to the bank, and about $1,700 directly to creditors of *J. W. Clagett;* that defendant determined to sell the land, and with the proceeds, and his own estate, pay the debts of his testator, and so soon as those debts were paid, to invest one-half the amount for which said lands was sold, for the benefit of his said sister; and this is still his intention. That a portion of the debts of his testator yet remain unpaid, and according to his intention the investment prayed for was not to be made until the debts were fully paid. Prayer to be dismissed.

The will of *Susanna Maria Digges* was filed with this answer.

The deed of *Joseph W. Clagett* and *W. D. Clagett*, of the 19th of May, 1827, for *Melwood*, to *Benjamin H. Clarke*, his wife and children, in consideration of $10,000, was also filed with the answers.

The answer of *Charles Hill* showed, that he had renounced the executorship of *J. W. Clagett's* will, that he did not sell the land of *J. W. Clagett*, and reiterated the allegations of *W. D. Clagett*, in relation to the proceeds and application of the the bonds and purchase money of the land sold by *W. D. Clagett.*

No answer was filed by *Vernon Dorsey.*

The evidence taken in the cause, so far as it is material, will be found in the opinion delivered in this court.

On the 10th of November, 1834, the chancellor (*Bland,*) decreed, that the deed of the 17th April, 1828, from *J. W. Clagett* to *W. D. Clagett*, was void as regards the rights and interests of the plaintiffs—that the defendants, *W. D. Clagett*, *Charles Hill*, and *Vernon Dorsey*, together and respectively, account with the plaintiffs, *Hall and wife*, of and concerning the real and personal estate devised by *J. W. Clagett* unto *Henrietta M. Hall*, and of the proceeds of the land sold by *W. D. Clagett*, a part of the securities for the payment of the purchase money of which, have passed into the hands of the said defendants, *Charles Hill* and *Vernon Dorsey.* The de-

cree then referred the cause to the auditor, with direction to state an account accordingly, from the pleadings and proofs now in the cause, and from such other proofs as might be laid before him, except the deposition and testimony of the defendant, *Charles Hill*, which was rejected—further proof was allowed to be taken on the usual terms, and the injunction granted was continued till final hearing or further order.

After this decree the auditor stated accounts, and exceptions, showing the points relied on before the chancellor, were filed by consent; the matters to which they relate appear in the opinion of this court.

The defendants, *William D. Clagett* and *Charles Hill*, appealed from the decree of the chancellor.

The cause was argued before Stephen, Archer, Dorsey, Chambers, and Spence, Judges.

Duckett, for the appellants, contended:

1. That neither of the appellees could derive any benefit from the alleged trust in the will of *Joseph W. Clagett*, until his debts were paid, which is neither alleged nor proved.

2. That the deed from *Joseph W. Clagett* to *William D. Clagett*, of April, 1828, was founded on a good and valuable consideration, and there is no evidence to show, that the grantee took under the will, and not under the deed—and as the debts of the testator exceeded the value of the property in *Calvert* county, and his other property, not disposed of by the deed—the whole was applicable to the payment of debts.

3. That if the decree of the chancellor shall be affirmed, the fund will pass into the hands of *Richard Hall*, the husband of the female complainant, contrary to the clear intention of the testator.

4. That the bill is defective is not making the children of the female complainant, parties, and in the omission of other necessary parties.

5. That *Charles Hill* having renounced the trust could not be either jointly with *William D. Clagett*, or separately charged for a breach of trust by the latter if he has been

guilty of one, and that the chancellor erred in so charging him.

6. It being apparent that *Charles Hill* was *bona fide* under the impression that the *Calvert* property was liable to be sold for the payment of debts, he is not to be charged, because such an application has been made; especially as the estate of *William D. Clagett* is neither alleged nor proved to be insufficient.

7. That the decree is defective in requiring *Clagett* to pay into court, the principal fund against the express wish of the testator, that it should remain in his hands, there being no allegation in the bill or proof in the cause, that the fund is in danger.

8. That the bill is defective in not calling upon the executors to account, and in not calling on the creditors to exhibit their claims.

9. That the decree is erroneous in declaring the deed from *Joseph W. Clagett* to *W. D. Clagett* void, there being no prayer in the bill that it shall be declared void.

10. That the chancellor erred in rejecting the testimony of *Charles Hill* and in admitting the testimony of *James Kent*, the former being a competent, and the latter an incompetent witness.

J. Johnson, for the appellant,

Argued the 1st, 2d, 4th, 5th, 6th, and 10th points. On the question that the appellants were not confined to the consideration expressed on the face of the deed of the 17th April, 1828, he cited: 1 *Har. and Gill*, 175, 202. To show that the recitals of the deed did not operate by way of estoppel. 3 *Thos. Co. Lit.* 467, 468. He contended that *Clagett* took under the deed and not under the will which was ambulatory. The words give, grant, enfeoff, import a delivery of possession. 3 *Thos. Co.* 332. 8 *Rep.* 82. The deed and will are not one instrument. 2 *Sch. and Lef.* 501. The short copies of judgments are not objected to. Upon the question of want of parties. 3 *John. Cases*, 311. That *James Kent*, the pur-

chaser was a necessary party bound to look to the application of the purchase money. 1 *Pow. on Mort. ch.* 9, 240, 241. 2 *Fonb. Eq.* 152, 153. 1 *Mad. Ch. Prac.* 443, 545. *Sug. on Ven.* 368. 2 *Vernon*, 271. 4 *Ves. Jr.* 97. 8 *Wheaton*, 421. *Charles Hill* not responsible as trustee. 2 *Mad. C. P.* 162. The evidence of *Kent* was excepted to in chancery. The act of 1832 is complied with, and his evidence as a party interested was properly rejected. Hence the answer remains unimpeached.

If the *Bank of Metropolis* is a necessary party, the court may remand the cause.

Alexander, for the appellees, contended:

1. That the deed from *Joseph W. Clagett* to *William D. Clagett*, being dated on the same day with the will of the said *Joseph W. Clagett* and conveying the same property as is devised in the will to *William D. Clagett*, is to be considered as a part of the testamentary disposition of the said *Joseph W. Clagett.*

2. That the said *William D. Clagett* having sold the property devised to the appellee, *Henrietta M. Hall*, in virtue of the trust in the testator's will, is bound to appropriate the proceeds in the manner directed by the will for the benefit of appellee, *Henrietta M. Hall.*

3. That there is sufficient evidence in the cause that the appellant, *William D. Clagett*, claimed the property devised to him by his father, under the will, and not under the conveyance.

4. That the appellant, *Hill*, is chargeable with the proceeds of the sale of the land in the proceedings mentioned, he having notice of the breach of trust on the part of the appellant, *Clagett.*

5. That there is no evidence in the cause to shew that *Joseph W. Clagett* owed or was liable for any of the debts due on the judgments, short copies of which are returned with the commission; and he cited:

Act of 1825, ch. 117. 1763, ch. 13. 1729, ch. 8, sec. 5.

1 *Ves. Sr.* 127. 2 *Ves. Jr.* 221. 1 *Williams on Ex.* 54. 1 *Simon and Stuart*, 105. 16 *Ves.* 151. 3 *Swan*, 699.

PRATT, in reply, cited:

2 *Gill and John.* 458. 1763, *ch.* 13. 1 *Har. and Gill*, 202.

DORSEY, Judge, delivered the opinion of the court.

The first reason assigned by the appellants for the reversal of this decree is, that the appellees nor either of them can derive any benefit from the alleged trust in the will of *Joseph W. Clagett* until his debts are paid, which is neither alleged or proved. As far as this objection rests upon the imputation of defective allegations in the bill, it does not appear to be sustained. If all the matters charged in the bill were true, it would not be requisite to entitle the appellees to the relief sought either to allege or prove the non-payment of the debts of the testator. The appellees charge that the deed from *Joseph W. Clagett* to *William D. Clagett*, made under the special trust and confidence that the grantee should pay the debts of the testator, which fact, if established, would in effect be a revocation of that clause in the will that directs the testator's real and personal estate to be kept together until his debts should be paid. And the further allegation of the sale of the land devised in trust for *Henrietta M. Hall* and her children, is of itself evidence that the debts were paid.

The second reason is, that the deed from *Joseph W. Clagett* to *Wm. D. Clagett* of the 17th of April, 1828, was founded on a good and valuable consideration, and there is no evidence to shew that the grantee took under the will, and not under the deed, and as the debts of the testator exceeded the value of the property in *Calvert* county, and his other property not disposed of by the deed, the whole was applicable to the payment of the debts. In support of the allegations in the bill, that the deed of the 17th of April, was obtained by fraudulent pretences and undue influence exercised over the testator, no testimony has been offered; and the answer of

William D. Clagett, which is controlling evidence upon this subject, disproves such an assertion. That there was in the execution of this deed, a secret trust that the grantee should pay the debts of the grantor, some equivocal, inconclusive testimony has been offered, rather by way of inference than as direct proof. It has been proved that *William D. Clagett* sold the trust property under the will, well knowing the inadequacy of the testator's estate to pay his debts, and that frequently since that period he had admitted it to be his intention to invest the proceeds of sale, as directed by the will in trust for his sister and her children. From these acts and admissions an inference might arise of the existence of the secret trust in relation to the deed. To repel which, the will of *Susanna Digges*, the deed from *Joseph W. Clagett* and *William D. Clagett* to *Benjamin H. Clarke* and others, and also other testimony have been offered by *William D. Clagett*, to show that the deed of the 17th of April was executed upon a full and adequate consideration, wholly inconsistent with the existence of the secret trust aforesaid. But to such will, deed, and testimony, the appellees' solicitor have objected on the ground that the deed of the 17th of April being impeached for fraud, no evidence of any other consideration than that expressed in it can be received to sustain it. And the case of *Betts and wife vs. The Union Bank*, and many other cases, have been adduced to support the objection. But the authorities referred to have no application to the question on which they have been produced. The deed before us has not been rendered void and inoperative by disproving the consideration expressed in it. The proof is not offered to ingraft into it a new consideration, without which it ceases to have any legal existence or validity, nor to add to, vary or change the written instrument by proving a consideration not expressed in it, but it is offered to contradict the evidence (if any had been produced) of fraudulent pretences and undue influence exercised over the testator; and to repel and discredit the charge of secret trust to pay debts. But an unanswerable reply to the objection to

the evidence offered is, that it was not taken by exception in the Chancery court, agreeably to the requisition of the act of 1832, ch. 302, sec. 5, and is therefore excluded from the consideration of this court. Had the testimony given by the appellees to prove the secret trust been objected to in the court below as inadmissible for that purpose, the objection must have been sustained. The effect of its introduction was in opposition to one of the best established principles of the law of evidence, to change and add to a written agreement by a new and important clause altering the terms of the contract; the omission to insert which in said agreement was neither alleged or proved to have been the result of fraud, surprise, or mistake.

But reject if you please the evidence now objected to by the appellees, and it avails them nothing. Their inferential proof of this secret trust is annihilated by the answer of *Wm. D. Clagett*, and disproved by the deed of the 17th of April itself, which contains a covenant warranting the property conveyed to the grantee free, and discharged from all claims and incumbrances arising under the grantor.

The effort which has been made to shew that the deed of the 17th of April is to be regarded as a part of the last will and testament of *Joseph W. Clagett*, cannot be supported. The deed upon its face bears no mark of such testamentary character. When viewed in connection with the will no such inference can be drawn from their inspection. There is nothing in the proof in the cause to sustain it. The deed itself demonstrates its untruth.

We do not design at this time to express any opinion whether *Wm. D. Clagett* (when the proceedings in the cause shall have been placed in that situation in which they ought to be before a final adjudication is made upon the rights of the parties) will be permitted to apply the proceeds of sale of the trust property to the payment of the testator's debts; all we mean to say is that if the facts stated in his answer be substantiated, the proceedings and proofs in the cause as

now presented to us, interpose no estoppel or inflexible principle of equity to debar him from such relief.

In the discussion of the third objection it has been conceded to the solicitors on both sides, that the decrees of the chancellor are erroneous in ordering the fund in controversy to be brought into court *to be paid to the complainants*. Such a disposition being in direct opposition to the prayer for relief, which he has been called on to grant, and to the will of *Joseph W. Clagett*, which in the most guarded and explicit manner excluded one of the complainants from the receipt and participation in any part of the fund.

The fourth reason is that the bill is defective in not making the children of the female complainant parties, and in the omission of other necessary parties. There can be no error in not making the children of *Henrietta M. Hall* parties, because it does not appear that she has any children, and if it did so appear they ought not to be made parties, the terms of *Joseph W. Clagett's* will vesting the property in controversy absolutely in the mother so far as the rights of her children are concerned. But there is error in not making the *Bank of the Metropolis* a party; the answer of *Wm. D. Clagett* shewing its interest in the fund on which the decree of the court is to operate. The bill contains no specific prayer for an account of personalty. If it did, or if the complainants below under the allegations in their bill and the general prayer for relief require such an account, *Susanna Maria Hill* must be made a party. There is no occasion to make her a party on account of any interest she once had in the moiety of the *Calvert* county lands.

The sufficiency of the fifth reason, which is that *Charles Hill* having renounced the trust, could not be either jointly with *William D. Clagett*, or separately charged for a breach of trust by the latter if he has been guilty of one, and that the chancellor erred in so charging him we think cannot be denied. His answer, which is responsive to the bill, and which is confirmed by the testimony of *James Kent*, taken by the appellees, shews his renunciation of the trust to which

he was appointed in conjunction with *William D. Clagett*, and there is no proof whatever that any portion of the trust fund ever came to his hands. The auditor dealt with *Charles Hill* accordingly. In making his audit of the trust fund he stated no account against him, there being nothing in the record to warrant it. In his account A, he charged *Wm. D. Clagett* with the entire price for which the land was sold, with interest thereon from the day of sale, although according to the proofs in the cause a considerable portion thereof was staid by an injunction, issued in this cause in the hands of *Vernon H. Dorsey*, a co-defendant, who at the prayer of the appellees was enjoined from paying the same either to *Wm. D. Clagett* or *Charles Hill*, and by the prayer of the bill the decree was asked for to compel said *Dorsey* to bring the money into court for investment. This injunction was continued for upwards of two years and a half, until the final decree, when the chancellor ratified account A, as above stated, which charged *William D. Clagett* alone, but further decreed not only against *Wm. D. Clagett* but against *Charles Hill*, also requiring them to bring into court the whole amount of account A, although it appeared by the auditor's accounts B and C, that a part of that amount was still in the hands of *Vernon H. Dorsey*, under the operation of the injunction. Against *Vernon H. Dorsey* no decree was passed. Thus, *Hill*, as trustee, was ordered to bring into court a large sum of money, with interest thereon, not one cent of which was it in proof that he had ever received, or ever ought to have received, and to pay a sum of money, with interest thereon, for two years and a half, which by the positive injunction of the Chancery court issued in this cause, remained during that time in the hands of another, and which he, *Hill*, by the same injunction, was prohibited from receiving, and never did receive or ought to have received. As to this last mentioned sum of money, and interest, *Wm. D. Clagett* shared the same fate with *Charles Hill*, and his condition differed not materially from that of *Hill*, except that but for the issuing

of the injunction he was authorized to have received that sum of money, without interest, from *Vernon H. Dorsey*.

Our opinion of the sixth reason is sufficiently expressed in the views we have taken of the fifth.

We do not think the decree of the chancellor erroneous on the ground assigned in the *seventh* reason. Had the conduct of *William D. Clagett* been such as it is alleged to have been in the bills of complaint, and his situation as such as from the proofs in the cause it would be fair to presume it to be, and had the complainants shewn themselves entitled to the fund in question, we think the chancellor would have been authorized in ordering it into court.

The objection raised by the *eighth* reason as to the form of the bill of complaint we do not think well founded. Neither by any of the specific prayers in the bill, nor by any of the proceedings under it, have the complainants claimed any thing of the defendants on account of the personal estate. They could have no motive therefore in calling on the executor to account for the personal estate of the deceased. Nor can a reason be assigned why the complainants should call on the creditors to exhibit their claims. So far from admitting the rights of such claimants to the whole or any part of the fund in litigation, the bill of complaint is predicated upon a total denial of such rights, and a call for such account and exhibition by the appellees, would have been an act of great inconsistency. Not so on the part of the appellants. Their defence could only be sustained by the statement of such an account and the proof of the debts due by the testator. It is for them, therefore, and not the opposite party, to ask at the hands of the chancellor an opportunity of taking such account and exhibiting such proof.

We concur with the appellants in their assertion in their ninth reason, that the decree is erroneous in declaring the deed from *Joseph W. Clagett* to *William D. Clagett* void, but not for the reason assigned. Had the appellees established by proof the allegation in their bill that the deed was obtained by fraudulent pretences and undue influence, exercised

over the testator, without any specific prayer for that purpose, but under the prayer for general relief, it was competent for the Chancery court to have vacated the deed. The error which we in this respect impute to the decree is, that it vacates the deed under this allegation without a scintilla of proof to support it, and regardless of the defendant's (*Wm. D. Clagett's*) answer which positively denies it.

We cannot concur in the appellants' tenth reason "that the chancellor erred in rejecting the testimony of *Charles Hill*," because *Hill* being a defendant in the cause, and being examined as a witness without the pre-requisite order of the court for that purpose, his testimony was properly rejected on that ground. But it was inadmissible on another ground, he had a direct interest in defeating the claim of the appellees and sustaining that of *William D. Clagett*, his co-appellant, who had pledged the fund in controversy to secure a debt due by him to the *Bank of the Metropolis*, and for which the witness offered was liable as the endorser. But we are of opinion that the chancellor erred in permitting the whole evidence given by *James Kent* to go to the auditor in his statements of the accounts directed by the decree of the 10th of November, 1834, a great part of the testimony of the witness appearing to be inadmissible. In stating the accounts ordered, the claims of the creditors of the testator upon the fund in dispute was a fit subject for the consideration of the auditor, notwithstanding they were matters put in issue by the bill and answers. The witness, *Kent*, was interested in establishing the secret trust alleged in the amended bill, as by securing to the creditors payment of their demands out of the property conveyed by the deed of the 17th of April, he so far rescued the lands conveyed to him in *Calvert* county from the pursuit of the creditors. So far also as to the evidence offered of the notes assigned to *William D. Clagett*, and the sperate payment made upon each assigned note, such testimony was inadmissible without producing the assigned notes or satisfactorily accounting for their non-production, and on proof of service of the appropriate notice to

produce them should they have been in the possession of the appellants so as to let in the secondary evidence which was offered. The same objection applies to that part of the witness's answer to the sixth interrogatory, which alleges the execution of the bond by *William D. Clagett* as trustee of *Mrs. Hall*, and of the deed from *Clagett*, *Hill* and wife, to *James Kent*. The chancellor therefore on the appellants' exception to the testimony given by *James Kent*, ought to have withheld the following portions of it from the auditor, viz: the answers of the witness to the third interrogatory, and to the fourth, except the proof of the cash payment of $1,500, and to the fifth, and also all that part of the answer to the sixth interrogatory which alleges the execution of the deed and bond above mentioned, and the assignment and payment of the notes mentioned in his answer to the preceding interrogatory. From an attentive examination of the record in this case, we are satisfied that the reversal or affirmance of the decree passed herein, cannot take place without the risk of doing injustice to one or the other of the parties, and have therefore adopted the following order:

It appearing to this court that the substantial merits of the cause will not be determined by the reversing or affirming the decree of the chancellor, and that the purposes of justice will be advanced by so doing, it is thereupon, this twenty-first day of December, 1837, ordered and adjudged by the authority of this court that this cause be remanded to the court of Chancery for the purpose of amending the pleadings, making the *Bank of the Metropolis* by its proper corporate name a party defendant, and that such other and further accounts be stated by the auditor, and such further testimony be taken therein before a commissioner or commissioners, the auditor or otherwise, and other proceedings had under the direction of the chancellor, as shall be necessary for determining the cause upon its merits.

CAUSE REMANDED TO CHANCERY UNDER ACT OF 1832, *ch.* 302.

GEORGE WAREHAM *vs.* JACOB SELLERS, *adm'r of* PHILIP SELLERS.—*June*, 1837.

A paper in the following terms was offered to the Orphans' court of *Carroll* county for probate.

"*August* 12*th*, 1836.

"This will certify that I do assign, and *gave* all my personal property unto *George Wareham*—that is to say, one silver watch, one chest, *one beaurough*, and some carpenters' tools, besides two notes of hand, one $200, and one of $89, and $18 book account.

"Signed by me in the presence of *Thomas Sater*.

HIS
PHILIP ⋈ SELLERS."
MARK.

And the subscribing witness being produced, to prove the execution of the same, and that from conversation with the deceased at the time, and from other circumstances, that the said paper was executed as the last will and testament of the party; which proof was rejected by the Orphans' court, and the paper rejected.—*Held* on appeal, that the testimony should have been received, and the decree was reversed, and the record remanded for that purpose.

APPEAL from the *Orphans'* court of Carroll county.

On the 24th April, 1837, *George Wareham* lodged the following instrument in the custody of the register of wills of said county, to wit:

"*August the* 12*th*, 1836.

"This will sertify that I do assighn, and gave all my personal property unto *George Wareham*—that is to say, one silver wach, one chest, one beaurough, and sum carpenters' tools, besids two notes of hand, one two hundred dollars, and one of eighty-nine dollars, and eighteen dollars book account.

"Signed by me in the presence of *Thomas Sater*.

HIS
PHILIP ⋈ SELLERS."
MARK.

On the 1st May, 1837, *George Wareham* filed his petition, alleging that *Philip Sellers*, late of said county, deceased, being without children or any lineal descendants, and being

desirous of giving and disposing of his personal estate to the petitioner, who is the brother-in-law of the said *Philip Sellers*, did on the 12th August, 1836, make and execute a testamentary disposition of his personal property in writing—and by his mark signed the same in the presence of *Thomas Sater*, the subscribing witness—that the said *Philip Sellers* on the 6th September, 1836, died, and left the said testamentary disposition as and for his last will and testament in writing, duly executed, and a valid will of personal property. That *Jacob Sellers*, a brother of the deceased, hath obtained letters of administration on the estate of the said deceased without the knowledge of petitioner. That since the grant of letters said will has been left for probat, and is prayed to be taken as a part of this petition. Prayer that the will may be admitted to probat—that letters of administration may be granted to petitioner, the sole legatee in the will—and that the letters of the appellee may be revoked, for whom process was also prayed.

The said appellee appeared, and the subscribing witness to said paper was offered as a witness by the appellant to prove the execution of the same. The appellee objected to the witness being sworn and examined, upon the ground that the paper in question did not upon its face purport to be a will, and that therefore the court could not hear testimony to establish it as such. The appellant also offered to prove by the same witness, conversations of the deceased, made at the time of executing the said paper, and from other circumstances, that the said *Philip Sellers* made and executed the said paper as and for his last will and testament, and intended it as such. The same objections being made, the Orphans' court held, that the paper was not upon its face a testamentary paper, but an assignment and gift, intended to be consummated in the life-time of *Philip Sellers*, as contended for by the appellee's counsel, and that no parol testimony could be received for the purpose of proving that the said paper was intended by the said *Philip Sellers*, as testamentary, and

that the paper be rejected and not admitted to probat. The said *George Wareham* appealed.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

JAMES RAYMOND, for the appellant, contended:

That the paper had all the formalities of a will in its execution, disposing of personal property. *Wagner vs. McDonald*, 2 *Har. and John.* 346. *Brown's ex'r vs. Tilden, et ux*, 5 *Har. and John.* 371.

The *animus testandi* may be established by parol proof, and need not appear on the face of the paper. It is better proved by witnesses than by the contents of the paper. Publication is proved by parol. *Williams on Ex'rs*, 53, 54. 1 *Phillips*, 32, 53. The disposing words must be reduced to writing, and proof may be given of who made them, and whether made as a last will. *Sanford vs. Vaughan, et al*, 1 *Ecc. Rep.* 28. The paper contains intrinsic evidence that it was made as a will. The words, this will certify—to whom? —to futurity—to a court of justice. It is of all his personal property. The cases which relate to intrinsic evidence on this head are *White vs. Helmes*, 1 *McCord*, 430. 8 *Viner. Tit. Dev. Lyles et al vs. Lyles et al*, 2 *Nott. and McCord*, 531. A will may be established by circumstances. *Manly vs. Lakin*, 1 *Hagg.* 130. In 3 *Ecc. Rep.* 60. *Nichols vs. Nichols*, 2 *Phillomi*, 180. 1 *Ecc. Rep.* 225.

W. P. MAULSBY, for the appellee:

Admitted that no particular form of expression or execution was essential to constitute a will—yet that a testamentary disposition should appear on its face, or it should seem to refer in some mode, to the death of the maker. A reference to another will has been held sufficient—but here there was nothing to lead the mind to that event. *Glynn vs. Oglander*, 2 *Hagg. Ecc. Rep.* 428. In 4 *Ecc. Rep.* 181. *Passmore vs. Passmore*, 1 *Phil.* 216. In 1 *Ecc. Rep.* 76. 4

Ves. Jr. 565. *Thorold vs. Thorold*, 1 *Ecc. Rep.* 1. 8 *Law. Lib.* 18.

This court reversed the decree of the Orphans' court with costs—and ordered that court to proceed to reinstate the petitioner, and receive the testimony offered by him, and also to proceed to a hearing and trial of said cause, as to law and justice shall appertain; for which purpose the decree was reversed and the cause remanded.

DECREE REVERSED WITH COSTS.

JOHN G. CHAPMAN, *adm'r of* SAMUEL CHAPMAN *vs.* WILLIAM MORRIS.—*December*, 1837.

A party who sells property and receives the proceeds thereof as the agent of another, who held the same in trust, is liable to said trustee, in an action for money had and received, notwithstanding the cestui que trust knew of, and consented to the sale.

The mere circumstance of the cestui que trust knowing of and consenting to the sale, would not release the trustee from his responsibility to the cestui que trust.

To accomplish that, it would be necessary to show, that the latter consented to look to the party who made the sale for the proceeds of the property.

And in a suit by a trustee under such circumstances, his right to recover does not depend upon his having made advances to his cestui que trust, upon the faith of the trust fund.

APPEAL from *Charles* county court.

On the 7th March, 1825, *William Morris* commenced an action of *trespass* on the case against *Samuel Chapman*. His death was suggested, and *John G. Chapman*, his administrator, appeared.

The plaintiff declared that the said *Samuel Chapman* in his life-time, acting for and in behalf of the said *William*, who then, and there, had and held, certain negro slaves in trust for the use and benefit of a certain *Sarah Maddox;* he the said *Samuel*, at the request of the said *William*, sold and delivered to divers persons the said negro slaves, and received

therefor the sum of $1,457, which said sum of like money, the said *William* hath since paid and satisfied to the said *Sarah Maddox*, by and under a decree of *Charles* county court, in chancery sitting; of which said several matters and things, the said *Samuel* in his life-time had notice, whereby an action hath accrued to the said *William*, to have and demand of the said *Samuel* in his life-time, the said last mentioned sum of $1,457, and he the said *Samuel* being so indebted, in consideration, undertook and promised the said *William* to pay him the said sum of money. The second and third were the common money counts.

The fourth count was for matters and things properly chargeable in account as per account filed as follows:

Samuel Chapman, in account with *William Morris*.

28th Sept. 1818. To this sum the proceeds of the sales of certain negroes sold by you under my authority and by my consent, ... $1,457

To interest thereon from date.

To this sum, the costs and charges of a certain Chancery suit, in which *Sarah Maddox* was complainant, and *William Morris* respondent, paid, laid out, and expended for your use, ... $150

E. Exp. WM. MORRIS.

Issue was joined upon the plea that *Samuel Chapman* did not promise in his life-time as alleged, &c.

EXCEPTION.—At the trial, the plaintiff gave in evidence, the certificate of *Samuel Chapman*, admitting the sale of, and receipt of money for certain negroes which were conveyed to *William Morris* by *Sarah Maddox*, amounting to the sum of $1,457; and that *Chapman* sold said negroes and received the money as agent of the plaintiff.

The defendant, to support the issue on his part, read a bill of sale, from *Sarah Ware*, (now *Maddox*,) to the plaintiff, dated 8th December, 1807, for the negroes in question, and proved that said conveyance was in trust for *Sarah Ware*, who soon after intermarried *John Maddox*, a man in embarrassed circumstances—that *Sarah Maddox*, consented that

said negroes should be sold, and directed that *Samuel Chapman*, should purchase out of the proceeds of the sale, groceries and other necessaries for her family—that he, the defendant, purchased for *Mr.* and *Mrs. Maddox*, articles to amount of $765 ; that *Maddox* admitted the same to be just, and to be paid for out of the proceeds of the negroes—that the plaintiff admitted that the proceeds of the negroes were for the benefit and use of *Mrs. Maddox*, and knew of the purchases by defendant, as aforesaid, and that *Chapman* had paid to *Morris*, $600, part of the proceeds of said negroes. The defendant then gave in evidence, certain proceedings on the equity side of *Charles* county court, by *Sarah Maddox*, against the plaintiff *Morris*, in which the said *Sarah Maddox* recognized her conveyance to the said *William Morris*, in trust, and her consent to a sale of said negroes, on condition that $1,000 of the money should be reserved for her especial use and benefit, and vested accordingly, that said *Morris* had neglected to pay said $1,000. On the 9th June, 1824, it appeared in said cause that, the said *Morris* was decreed to pay said *Sarah*, $654 20, with interest from 31st January, 1818.

The plaintiff then gave in evidence, the bill of interpleader of *Samuel Chapman*, and the answer thereto, in which *Chapman* claimed to receive from *Morris* $600, of the fund in controversy—and also gave in evidence that the money decreed to be paid by *W. Morris* to *Sarah Maddox*, was paid to her, and his answer to her bill showing payments to the amount of $892 90, and that the said sum was allowed to him in the settlement with *Sarah Maddox*.

The plaintiff further gave in evidence, that at or about the time of the sale of the said negroes, there was an agreement between all the persons concerned, that $1,000, of the proceeds of said sale of negroes, was to be reserved by said *Morris*, and to be applied to the purchase of a house and lot in *Port Tobacco*. That although *Morris* frequently saw articles delivered by the defendant, at the tavern kept by said *John Maddox*, yet it was not known to said *Morris*, so far as said

witness can speak, how or out of what fund the same were to be paid for; he further proved that said *Chapman*, at the times when said articles were delivered, and during the time said *Maddox* was keeping tavern, dealt largely in said tavern, and had a large account in said tavern, to furnish which said articles were delivered.—And the defendant gave in evidence that, the contract for the reservation of $1,000, was agreed to be rescinded by *Mrs. Maddox*, and said *Chapman*, though he does not know whether *Morris* knew that fact, and further gave in evidence by the same witness, that *Mr. Maddox* was largely indebted in house rent to the said *Chapman*.

The defendant then prayed the court to instruct the jury, if they shall find from the evidence, that the proceeds of said negroes came into the hands of the said defendant's intestate, by and with the permission of said *Sarah Maddox;* that then the plaintiff cannot support the action on the count for money had and received, the said *Sarah Maddox* having the uncontrolled agency of the fund, and consenting that the said *Chapman* should receive the same. He, the said *Chapman*, is only responsible to the said *Sarah Maddox;* and that the plaintiff cannot recover, unless the jury further believe from the evidence, that the trustee had made advances on the faith of the trust fund, to the amount thereof, which have not been allowed to him; which prayer and direction the court refused to give, and the defendant excepted.

The jury found a verdict, upon which the court gave judgment, for the plaintiff, $1,879 75, on which this appeal was taken.

The cause was argued before Archer, Dorsey, and Chambers, Judges.

T. S. Alexander, for the appellants, contended:

1. That the trust reposed in the appellee by *Mrs. Ware*, now *Maddox*, being by parol only, and the negroes having been delivered by the appellee to the appellant's intestate, *to be sold with the consent of Mrs. Ware*, the said intestate was

thereby substituted as trustee for *Mrs. Ware*, and became responsible to her only for the discharge of his trust, and at all events was not liable to be sued by the appellee as for *money had and received* to his use. 9 *East.* 378. 9 *Con. Ch. R.* 1. *Price and Nesbit vs. Bigham*, 7 *Har. and John.* 319. 1 *Mad. Ch. Pr.* 474.

2. Because if said intestate was liable to the appellee at all, such liability was limited in extent to the liability of the appellee over to the said *Mrs. Ware*, and therefore upon the case attempted to be made, the appellee ought to have been permitted to recover of the appellant no more than he had paid or was bound to pay to *Mrs. Ware.*

3. Because the payments made by the appellant's intestate to *Mrs. Ware*, with the consent of the appellee, were good payments in law and ought to have been allowed as such in the present action.

J. Johnson, for the appellee, maintained:

1. That it appearing from the evidence, that the intestate of the appellant sold the negroes in question, and received the money for them as the agent of the appellee, he was liable to the latter in an action for money had and received; the more especially, as the record discloses the fact, that the appellee has actually been compelled to pay the same to *Mrs. Maddox* by the decree of a court of competent jurisdiction.

2. That though the record shows the amount of the principal sum, decreed by the *Charles* county court in the case of *Maddox* against the appellee, there is nothing by which it can be ascertained how much was actually paid by the latter, including interest, costs, and other expenses attending the defence of said suit, all of which were proper subjects for the consideration of the jury.

3. That no question affecting the extent of the defendant's liability is presented by the exception taken by him in the court below, and consequently none such can be raised here. He cited: 2 *Com. on Cont.* 1. *Murphy vs. Baron*, 1 *Har. and Gill*, 258. *Com. Dig. Assumpsit, letter A. P.* 1. *Long-*

champ vs. Kenny, 1 *Doug.* 138. *Moses vs. McFerlan*, 2 *Burr.* 1009. *Grahame & Parris vs. Harris, et al*, 5 *Gill and John.* 489.

ARCHER, Judge, delivered the opinion of the court.

The prayer of the plaintiff is somewhat ambiguously worded, but as we understand it, it embraces two propositions. *First*—the general proposition that the plaintiff is not entitled to recover if the proceeds came into the hands of the intestate by the consent of *Mrs. Maddox*, the *cestui que trust;* and *secondly*, that the plaintiff could only recover in case the jury believed that the plaintiff had made advances on the faith of the trust fund, to the amount thereof, which have not been allowed him.

We think the court were right in rejecting these prayers. The defendant's intestate was appointed to sell these negroes by the plaintiff, with the consent of *Mrs. Maddox*, but that fact alone would not release *Morris* from his responsibility as a trustee. To accomplish this purpose the prayer should have gone further, and have put it to the jury to find the fact that she had consented to look to the defendant's intestate for the proceeds. She might have consented to his agency in the sale, knowing his responsibility to her trustee, without meaning in any degree to have looked to him for the proceeds, otherwise than through her trustee; and there is evidence to go to the jury from which this fact might have been inferred. It would therefore have been erroneous to have directed the jury that the reception of the proceeds by consent of *Mrs. Maddox*, would prevent the plaintiff's recovery.

The second proposition is not sustained, because, if *Chapman* was appointed the plaintiff's agent to sell these negroes, and there is evidence to go to the jury to prove this, still notwithstanding her consent that *Chapman* should sell the negroes, she may have looked to the responsibility of her trustee, as *Chapman's* principal, and may have given her consent to such agency, with no view to the substitution of a new trustee. In this point of view the right of the plain-

tiff's recovery could not be made to depend upon his advances to *Mrs. Maddox* upon the faith of the trust fund.

JUDGMENT AFFIRMED.

RICHARD W. ISAAC *vs.* CALEB CLARKE.—*December*, 1837.

An appeal from the judgments of the county courts will not lie in all cases where a writ of error would lie.

The act of 1713, ch. 4, applies only to civil cases, and consequently does not embrace proceedings in cases of forcible entry and detainer.

A certiorari having issued from the county court to bring before them certain proceedings which had been had before justices of the peace upon a writ of forcible entry and detainer, and the county court having overruled exceptions taken thereto, upon which the record was brought by appeal to this court, it was *held* that it would not lie, and the appeal was dismissed.

Quere, whether the court would have had jurisdiction, if the record had been brought up by writ of error?

APPEAL from *Prince George's* county court.

On the 27th April, 1835, the appellant filed his petition in *Prince George's* county court, suggesting that on the 17th June, 1826, *Francis Belmear* purchased at sheriff's sale certain tracts of land lying in said county and called, &c. that he sued forth writs of *hab. fac.* to obtain possession, but their execution was rendered unnecessary by the tenants delivering possession to him and agreeing to pay said *Belmear* rent—that *Belmear* conveyed the land in fee to the wife of your petitioner, and that your petitioner became possessed of said land by his tenants: That while he was so possessed a certain *Caleb Clarke* entered upon the dwelling house, claiming it, refused to give it up, pushed your petitioner from the door, and forbid his entering the same. That said *Clarke* then sued out a writ of forcible entry and detainer against your petitioner returnable on the 20th March, 1835. That your petitioner objected to proceeding under said writ for want of notice, but the justices of the peace forced on a trial; the jury returned a verdict against your petitioner, and the jus-

tices awarded restitution to said *Clarke*. The petition then proceeded to allege various grounds of irregularity in the process, the want of notice and misconduct of the justices, and prayed for a *certiorari* to remove the cause into *Prince George's* county court.

On this petition the county court awarded a *certiorari* directed to the justices, commanding the return of the inquisition, and all proceedings under it as it remains before the said justices, &c. and the justices accordingly returned all the proceedings. In the county court the appellant took various exceptions to the proceedings before the justices, which the court overruled, except that complaining of the allowing of costs by the justices, which the court sustained. The appellant thereupon appealed to this court.

At this term the appellee moved to dismiss the appeal, on the ground that no appeal would lie, from the judgment of the county court in this case.

This motion was argued before ARCHER, DORSEY, and CHAMBERS, Judges.

C. C. MAGRUDER, for the motion.

The proceedings here were to regain possession after a forcible expulsion, which is a criminal proceeding, and from which no appeal lies. 2 *Chitty's Gen. Prac.* 233, 236. The act of 1785, ch. 87, sec. 6, is the only one which gives an appeal in a criminal case in this state, and it only applies to penalties. If this was to recover a fine, an appeal would lie. *Queen vs. The State*, 5 *Har. and John.* 232. The right of appeals is confined to the cases enumerated in that act. That declares that any party or parties aggrieved by any judgment or determination of any county court in any civil suit or action, or any prosecution for the recovery of any penalty, fine, or damage, shall have power to appeal. We deny that this is a civil suit or action, or that it is a prosecution for the recovery of a penalty, fine, or damage. The remedy is by writ of error.

Thos. Duckett, for the appellant, contended:

The appellee's is a motion to dismiss the appeal because it will not lie, under the act of 1785, ch. 87, sec. 6. It becomes an act of supererogation to attempt to show by argument *upon the words of the act of* 1785, *ch.* 87, *sec.* 6, that the appeal in this case has been well taken, since there is no doubt, that before the act referred to, a writ of error would have been sustained; and this court themselves have most lucidly declared in *Queen vs. The State*, 5 *Har. and John.* 232, that the only effect of the act in question, in reference to cases in which a writ of error would have laid before the passage of the act, is to give the party entitled to it, the option to take either a writ of error or an appeal—or in other words, to remedy inconvenience and prevent expense, the act of 1785, enabled the party complaining of error in the court below, to appeal if he thought proper instead of resorting to his writ of error, his right to which was in no way impaired by the act of 1785, ch. 87, sec. 6. If this court have given a judicial interpretation to the act of 1785, ch. 87, sec. 6, by declaring generally that where the party before that act, was entitled to a writ of error, since that act he may at his option adopt an appeal—the only inquiry in the case at bar would be, 'would a writ of error have been the proper remedy before the act of 1785, ch. 87, sec. 6. The motion to dismiss the appeal in this case, therefore, naturally presents two inquiries which will be examined in the order in which they are submitted. 1st. Has this court judicially interpreted the act of 1785, ch. 87, sec. 6, as conferring upon a party entitled before that act to a writ of error, the power after that act, at his election to take a writ of error or an appeal. 2dly. If so, would a writ of error before the act of 1785, ch. 87, sec. 6, have been the proper remedy of the appellee in the case at bar.

It is insisted most respectfully that the first proposition is entirely sustained by the decision of this court in *Queen vs. The State*, 5 *Har. and John.* 233, and that giving to the language of the court in that case a reasonable and rational con-

struction, it follows, that if in this case a writ of error would lie, an appeal will lie. It is not pretended that the facts in that case and those in this are at all similar, except so far as they may be both regarded as criminal proceedings. The principles laid down by the court in the case alluded to, must be regarded as general principles, intended to enlighten the profession as to the general scope of the act in question, and the rights of parties to appeals under it. The decision of the court in *Queen vs. State*, if intended merely to prove that in that case the bill of exceptions was improperly taken to the decision of the court below upon the evidence offered at the trial, and the appeal properly taken from the decision of the court below overruling the motion in arrest of judgment, was in many of its parts unnecessary. What was that case? It was an indictment for a penalty under the act of 1796, ch. 67, sec. 19, for assisting a slave in eloping from her master. In the progress of the cause there was a bill of exceptions taken to the opinion of the court in reference to the admissibility of certain evidence, and there was also an appeal taken from the decision of the court overruling a motion in arrest of judgment for certain alleged defects in the record. Two questions therefore presented themselves—1st. Whether the bill of exceptions was properly taken—and 2dly, Whether the appeal from the decision overruling the motion was properly taken. That the appeal from the decision of the court below upon the motion in arrest of judgment was properly taken under the act of 1785, ch. 87, sec. 6, no intelligent mind could doubt, because the indictment was for a *penalty*, and the act in question gives a party "full power and right to appeal from a judgment in a prosecution for the recovery of any penalty, fine, or damages." No argument therefore was necessary to establish the right of the party to his appeal in that case from the decision of the court overruling his motion in arrest of judgment, and so the court thought, for they dismissed that part of the subject in two sentences, in the following words: "The court are of opinion that the indictment in this case is sufficient, and they affirm the judgment

of the court below—this being a question of law apparent on the record, the party was authorized to appeal by the act of 1785, ch. 87, sec. 6." If they do not say expressly in the last of the sentences above quoted, that wherever a question of law is apparent on the record, the party is authorized to appeal by the act of 1785, ch. 87, sec. 6, they certainly come very near it; for they say that the party was authorized to appeal in that case, by the act of 1785, ch. 87, sec. 6, "the decision appealed from being a question of law apparent on the record." Now at common law it is very clear that where the error was apparent upon the record the party was in all cases, except perhaps treason and felony, entitled to his writ of error. 1 *Bac. Abr.* 614. *Salk*, 504. *Show.* 85, 98. 6 *Mod.* 130. If, therefore, the court had gone no further in their decision than to use the above language upon the subject, it might still have been fairly argued that they meant it should be inferred that an appeal under the act of 1785, ch. 87, sec. 6, would lie in a case fit for a writ of error. But they have not left us to inference from the above language—they have expressed the above idea in the clearest language imaginable. After asserting, as is unquestionably true, that at common law there was no bill of exceptions, and that the statute of Westminster which first provided a bill of exceptions, gave it only in civil cases, and not in criminal ones, and that the act of 1785, does not give a bill of exceptions in the criminal cases therein enumerated; the court use the following lucid and emphatic language which it would seem cannot be misunderstood as a judicial interpretation of the act in question for the regulation of the profession in the taking of appeals. "Before that act, if error appeared on the record it could be carried to the court of Appeals only by a writ of error; this was attended in many cases with expense and inconvenience, to remedy which, the legislature gave the party complaining an election to carry up the case either by writ of error or appeal, and *this is the only effect of that act of assembly!*" The language of the court in the above sentence is general, applying to all writs of error—it is perfectly

clear and unambiguous. It was not *necessary to have been used in the above case*, either for the purpose of shewing that the bill of exceptions was improperly taken, or the appeal from the decision overruling the motion in arrest of judgment, *properly taken*. It emphatically declares that if in any case a writ of error will lie, in the same case an appeal at the option of the party will also lie, and the party in all such cases may determine for himself whether he will save expense or obviate inconvenience by the one remedy or the other and act accordingly. Without further argument, therefore, it appears that if in the case at bar a writ of error would have been an appropriate remedy before the act of 1785, ch. 87, sec. 6, the appeal which has been taken must be sustained. Upon the second point to prove that a writ of error would lie both before and since the act of 1785, ch. 87, sec. 6, he referred to, 4 *Har. and McHen.* 3 *Fitzherbert's natura Brevium*, 214. 1 *Har. and John.* 340. 1 *Salkeld*, 264. 1 *Har. and McHen.* 538. 1 *Show.* 13, 260. 1 *Levin*, 149. *Co. Lit.* 268 *a* 3 *Thos. Co.* 554. 1 *Bacon.* 325. 2 *Salk.* 504. 3 *Black*, 411.

T. S. Alexander, for the appellant:

A writ of error lies in all cases of final judgment from the King's Bench to Parliament. In cases of discretion or judgments not final, appeals do not lie. To remedy errors in interlocutory decrees, these are received after final judgment. The provincial court exercised the power of the court of King's Bench, and it was not founded on state. The governor and council reviewed the provincial court, just as Parliament reviewed the King's Bench. The general court took the place of the provincial court, and the court of Appeals reviewed its proceedings. Then the county courts took the place of the general court.

The 56th article of the constitution gave the court of Appeals jurisdiction with no limitation on that power.

The act of 1804, gives the present court of Appeals, jurisdiction of the old court of Appeals, and the appellate

jurisdiction of the old general court combined. It unites both jurisdictions in its power of review.

The act of 1785, ch. 87, sec. 6, only determines the final appellate jurisdiction of the general court. It establishes the jurisdiction of the county courts, and allows an appeal from them to the general court. It is silent as to jurisdiction of the court of Appeals, and does not limit it. The jurisdiction of the court of Appeals is found in the principles of the general common law, and not in the act of 1785.

A writ of error in a criminal cause is *ex debito justitiæ*.

By act of 1713, ch. 4, sec. 5, an appeal lies in all cases where writ of error lies. It applies to all cases civil and criminal, and the appeal in *Queen's* case, shows it is not confined to party and party, but extends to the public. 3 *Bacon Abr.* 250. *Lord Proprietary vs. Brown*, 1 *Har. and McHenry*, 428. *State vs. Scribner*, 2 *Gill and John.* 246.

A. C. Magruder, in reply.

In cases of forcible entry and detainer a *certiorari* may go. The grounds must be stated. Here the grounds of the application were declared, and the writ issued. The objections were not sustained by the county court. Then will an appeal lie? The analogy borrowed from the appellate power of the house of lords does not apply.

Before the act of 1785, an appeal was allowed, but it flowed from our own legislative acts of 1712, 1713. Now the act of 1713, does not apply to this class of cases. No act but 1785, authorizes an appeal in criminal cases, and it does not embrace this class. *Queen's* case is no authority, that was for a fine, and the court in deciding that cause confined the right to the cases enumerated. *Expressio unius est exclusio alterius.*

Dorsey, Judge, delivered the opinion of the court.

From the numerous authorities referred to in shewing cause why this appeal should not be dismissed, it would appear to have been assumed by the appellant, that an appeal

would lie from the judgment of the county court to this court, in all cases where a writ of error would lie. To this position we cannot assent. The act of 1713, ch. 4, entitled "an act for regulating writs of error and granting appeals from and to the courts of common law within the province," applies to civil cases only. The proceedings in cases of forcible entry and detainer, form a part of our criminal, not civil jurisprudence; and therefore, the right of appeal in such cases, is not provided for by that act. If it exist at all, it can only be derived from the act of 1785, ch. 87, sec. 6, which enacts "that any party or parties aggrieved by any judgment or determination of any county court, in any civil suit or action, or any prosecution for the recovery of any penalty, fine, or damages, shall have full power and right to appeal from such judgment or determination to the general court." Under this latter act of assembly, the case of the appellant cannot be sustained, there being no judgment or determination of the county court for any penalty, fine, or damages: the sole effect of the proceeding being the finding an inquisition against the appellant, for the forcible entry and detainer, and the award of restitution with costs to the appellee. *Jenifer vs. The Lord Proprietary*, 1 *Har. and McHenry*, 535. The appeal in this case is dismissed.

We wish it understood that in deciding this case we mean to intimate no opinion upon the question, whether this court would have appellate jurisdiction in this case had it been brought up by writ of error.

APPEAL DISMISSED.

CATHARINE THOMAS, Adm'x of NEWTON BRADLEE *vs.* THE VISITORS OF FREDERICK COUNTY SCHOOL.—*December*, 1837.

As a general rule, an executor, or administrator will be made to pay interest to the distributees on a balance admitted to be in his hands, and payable to them, in a legal course of administration. And where an administratrix had retained in her hands a sum of money, due to the party entitled as distributee, without applying to the court pending a controversy in relation to the title thereto, for permission to deposite, or dispose of it, so as to prevent the accumulation of interest, she was held liable to pay interest.

The decision of the Orphans' court, when not appealed from, is conclusive, as to the per centum to be allowed an executor, or administrator for commissions.

No allowance for commissions should be made upon the interest, chargeable to an executor, or administrator, for delaying the payment of the principal sum.

It is the uniform practice at law, where some of the issues are found for the plaintiff, and others for the defendants, to allow costs to the party, in whose favour the final judgment is given, and such is the general rule in chancery.

APPEAL from the equity side of *Frederick* county court.

The bill in this cause was filed by the appellees on the 12th September, 1828, and charged that, *Newton Bradlee* died intestate in *Frederick* county, without leaving any known relations or representatives, within the fifth degree of consanguinity, or affinity; that letters of administration were granted on his estate to the appellant; that she had assets which the appellees claimed under certain acts of assembly, as the public school of this county. Letters of administration were granted to the appellant in February, 1826. Her first account was passed on the 23d October, 1826, in which she charged herself among other matters, with $1,168, interest received on United States stock, and it appeared she then owed a balance of $743 58, to the estate of *Bradlee*. Her second account showing a balance due from her of $4,273 70, was passed on the 7th February, 1832. In this she was charged the balance of the first account $3,450, principal of United States stock, and with

dividends on said stock, to the 1st July, 1828, $126, and to the 1st January, 1829, $303 75, when the dividends on said stock ceased, the government having notified its intention to pay off the debt. The same account credited her with commissions, $329 90, being six per centum on $5,498 46. The stock of the government, was not in fact collected by the appellant, until the 7th April, 1834.

The right of the appellees to the balance in the hands of the appellant, having been established by a previous decision of the court, 7 *Gill and John.* 369, the auditor of *Frederick* county court, stated an account in which he deducted from the balance of the second account passed by the Orphans' court, to wit: the sum of $4,273 70, the principal of the United States stock, $3,450, creating a balance due on the 7th February, 1832, of $823 70, on which he charged the appellant with interest from that period to the making of the report, and also charged her with interest on the principal sum of the public stock from the period of her actual receipt of it to the time above mentioned; and charged her with the costs of the proceeding, making the whole balance due, $4,997 75.

The costs charged in this audit were, 1st. The complainant's costs in the county courts before the first appeal, $10 34. 2d. The costs in the court of Appeals, $53 85. 3d. The clerk of *Frederick* county court fee, $15 68. 4th. Auditor's fees, $9.

The defendant excepted to the account and report of the auditor on the following grounds:

1. Because the defendant is no where allowed such commissions, as she is by law entitled to, neither by the Orphans' court, nor by the auditor.

2. Because no interest should have been charged against her in said account, except the interest on $3,450, from 7th April, 1834, because there is no proof in the record that any other interest was received by her and not accounted for, whereas she is charged with $209 68, as interest, of which there is no proof in the record or account.

3. Because she is erroneously charged in said account with a balance of $823 70, due 7th February, 1832, of which there is no proof. On the settlement of the first account, of 23d October, 1826, she is charged with a balance of $743 58, the plaintiffs in this bill claim the principal sum, but at no time *demanded* interest thereon, and the decree of 15th March, 1834, passing it by, does not hold respondent accountable for interest on $743 58, cash in hand, but merely for such amount of interest as was actually received on the stock therein named, which interest commenced 7th April, 1834, and not before, yet has the auditor in said audit, by pursuing the instructions of the plaintiff's solicitor, and against the admission of the complainants in their bill, without authority, and of the decree aforesaid, charged interest or moneys which the plaintiffs are by their own showing and the decree aforesaid estopped to demand. This exceptant here impeaches the legality of the first and final account of the Orphans' court, marked exhibit A, and avers they are fundamentally wrong as respects the commissions there allowed.

4. Because if the said audit be correct in law and fact, respondent should have been allowed a commission of ten per cent. on the amount reported to be due, to wit: $4,906 68, (exclusive of costs,) whereas by reference to the final account settled 7th February, 1832, it appears she was allowed six per centum on the sum received, amounting to $329 90, the interest growing due according to this audit, from 7th February, 1832, is $635 18, on which sum no commissions whatever is allowed, and a trustee is as much entitled to commissions on interest as on principal actually collected.

5. Because the items of $10 34, $15 68, $9, audited in said account, are not chargeable to defendant, for the court of Appeals merely affirmed the interlocutory decree of this court, as it really was, which did not award any costs to the plaintiffs, and therefore, the court of Appeals could not decree the costs of the county court, until this court did so first decree.

6. That said account and report are erroneous in fact and law.

The county court, (*Buchanan C. J.*) on the 20th May, 1836, decreed that the report of the auditor, except as to the costs referred to in the fifth exception, be confirmed, and that the defendant pay to the complainants, or bring into this court for that purpose, on or before the 15th June, 1836, the sum due by the auditor's report of $4,962 73, being the whole amount due to the complainants under the proceedings in this cause, except the clerks and other costs including the auditor's; and that the defendant pay to the complainants their costs in this court as also the auditor's fees.

From the decree the said *Catharine Thomas* appealed.

The appeal was argued before ARCHER, DORSEY, and CHAMBERS, Judges,

By BALCH, for the appellant, and

By W. ROSS, for the appellee.

CHAMBERS, Judge, delivered the opinion of the court.

The appeal is taken from the opinion of the court, overruling the exceptions filed by the appellant in the court below to the auditor's report, and the duty of this court is therefore limited to the consideration and decision of the questions raised by those exceptions. The various other points argued by the counsel for the appellants will not be discussed by the court.

The first exception is abandoned. The fact that commissions were allowed by the Orphans' court is manifest on the face of the account, and of course the contrary could not be urged.

The second exception denies the obligation of the appellant to pay interest on the balance of the estate, except only, to the extent she has received interest.

The letters of administration were granted in February, 1826. The first account was passed in October, 1826, and left a balance in the hands of the administratrix of $743 58,

consisting of cash received, except the small amount of specific articles, $27 71. The second account was passed by the administratrix, on the 7th February, 1832, and charges her with the balance of the first account, the principal of the United States stock, and the dividends received by her on that stock since the first account, and the balance of this second account, after deducting the disbursements, claimed commissions at six per cent. and the principal sum of the United States stock, is stated by the auditor to be $823 70. The principal of the stock the auditor has deducted from this account, because the certificate of the register of the treasury, which was admitted in evidence, stated, that the principal was in fact paid on the 7th April, 1834. The same certificate shows that the dividends charged in the second administration account, were paid to the administratrix as early as May, 1829.

The appellant then standing in the attitude of an administratrix sued by a distributee, with assets subject to distribution, all received as early as May, 1829, except the amount of the United States stock, is charged with interest on the amount thus received, not from 1829, but from 7th February, 1832; when the last account was passed, and on the United States stock, not from the time when it might have been received by applying for it, not from the passing of the account in 1832, when it was charged as an item to be accounted for, as in the hands of the administratrix, but from the day it is admitted to have been received in point of fact, to wit: 7th April, 1834.

It is difficult to conceive any just principle, upon which a defendant can be excused from the payment of interest, upon the sum claimed by a distributee, as an admitted balance of personal estate in the hands of such defendant, and due to the plaintiff, in a legal course of distribution, as a general rule. In this case the sole question in contest has been, whether the appellee, the complainant below, was the party entitled as distributee. That there was a sum in the hands of the appellant, as administratrix, due to the person or persons

rightfully claiming as distributee, is not, nor can it be denied, and it is equally certain, that she made no effort by any application to the Orphans' court, or to the county court of *Frederick*, as a court of Chancery, pending this controversy, to deposite or dispose of the amount, so as to prevent the further accumulation of interest upon it.

We think then, that the appellant was bound, as in ordinary cases, to pay interest on the amount subject to distribution, and we also think, the rules of interest adopted by the auditor, are as lenient, as she had any claim to expect or require.

The objections contained in the *third* exception, will be answered by what has been said in regard to the second.

The *fourth* exception erroneously assumes, that the decision of the Orphans' court unappealed from, is not conclusive as to the per centum allowed to an executor or administrator for commissions. The decisions of the court have settled that question. The claim which is urged to commissions on the interest accruing to the distributee, on the surplus remaining after deducting commissions is utterly indefensible, and would be in effect to reduce the interest to less than six per cent. and put the difference into the pocket of the appellant, as a premium for delay in paying over the surplus.

The fifth exception was ruled good by the court below, and the only question raised here in regard to it, is in respect to the costs consequent upon the particular proceedings to which the items embraced by it have given rise. The appellant contends that the costs thus incurred ought to be allowed.

So far as we can learn, there has been a uniform practice as well in such a case as this, as in the analogous case of issues at law, part of which have been found for plaintiff, and others for defendant. In all such cases the practice has been, to allow full costs to the party in whose favour the final judgment in the case has been given. We should hesitate to disturb this long settled practice, even if the costs were considerable, and the means of ascertaining them per-

fectly practicable, but as neither of these facts exist in the present case, we will only express our approbation of the general rule.

The *sixth* and last exception is not so much a specific objection, as a general conclusion of law and fact adverse to the claim of the appellee, and as the view taken by this court accords with that taken by the county court, and which leads to the contrary conclusion, we concur with the opinion expressed by that court, in over-ruling this exception also, and affirm the decree.

DECREE AFFIRMED.

The Maryland Insurance Company *vs.* Joseph S. Bossiere.—*December*, 1837.

In the construction of a contract of insurance, as in other cases, the intention of the parties, when it can be ascertained, must govern their rights under it. The order when adopted into the policy, forms a part of it, and is to be adverted to, and considered in giving it a construction.

It is an established principle in the law of insurance, that the underwriters are presumed to be acquainted, with the nature and course of the voyage, which they undertake to insure.

Where insurance was effected on a cargo, at and from St. A. with liberty of two ports on the Spanish main, and at and from any of them to B, by a policy subscribed on the 4th day of April, 1831, upon an order therein referred to, as follows:

$4,500 insurance is wanted, on cargo of schooner *Argonaut, Captain Maginney*, at and from *St. Andreas*, with liberty of two ports on the Spanish main, and at and from any of them to Baltimore, with a return for each port not used. *Captain Drinkwater*, of the schooner *Desiah*, arrived here a few days since from *San Blas*, and reports that the *Argonaut* sailed from *San Blas* for *St. Andreas* about the middle of February to trade, which is the last account received of her proceedings—and the loss occurring on the voyage from *San Blas* to *St. Andreas*, it was *held* that the insurers were not liable, the loss happening before the risk commenced.

The order for the insurance was intended to define with certainty the voyage to be insured, and to obviate all mistake upon that subject.

The authority to commissioners to take testimony is special, and must be strictly pursued.

Evidence taken under a commission in which a different person from one of the commissioners named therein acted, rejected as inadmissible.

Commissioners have no authority to propound any questions to the witnesses but those which are sent out with the commission, and the answers to such questions should not be suffered to go to the jury.

APPEAL from *Baltimore* county court.

This was an action of *Covenant*, brought by the appellee on the 23d September, 1833, against the appellants. The declaration was for a total loss. The defendants pleaded that they had not broken their covenant, and filed the following agreement with the plaintiff.

It is agreed that under the plea of *non infregit conventionem*, filed in this cause, the defendants may rely upon any or all of the following defences:

1. That the policy in question did not attach.

2. That the order for insurance given by the plaintiff, through his agent, *Henry Thompson*, and the policy made by the defendants in pursuance thereof, constitute the contract, which applies only to a voyage commencing at *St. Andreas*, after the first day of February, 1831.

3. That if the policy did attach, the underwriters have been discharged by the deviation of the vessel.

4. That the plaintiff, to recover a verdict, must establish the identity of the voyage made by the vessel, with the voyage indicated in the contract with the defendants, arising from the order for insurance, and the policy.

5. That there has been no proof of loss and adjustment thereof, such as is required by the policy in question, and that these are indispensably preliminary to any action brought to recover such a loss as is claimed in this action.

At the trial of this cause, the plaintiff, to support the issue on his part, gave in evidence a policy of insurance, viz:—"By the *Maryland Insurance Company*, (No. 12,895.) Whereas, *Henry Thompson*, *as per order*, doth make insurance, and cause himself to be insured, lost or not lost, at and from *St. Andreas*, with liberty of two other ports on the Spanish main, and at and from any of them to *Baltimore*,

upon all kinds of lawful goods and merchandises, laden or to be laden on board the good schooner called the *Argonaut*, whereof is master for the present voyage, *Maginney*, or whosoever shall go for master in the said vessel—beginning the adventure upon the said lawful goods and merchandises from and immediately following the loading thereof, on board of said vessel at *St. Andreas* aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at *Baltimore* aforesaid; and it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. Touching the adventures and perils which we, the assurers are contented to bear and take upon us in this voyage; they are, of the seas, &c. And in case of loss, the same will be paid in ninety days after proof and adjustment thereof; the amount of the note given for the premium, if unpaid, being first deducted. In witness whereof, the *Maryland Insurance Company* have, by their president, subscribed the sum insured, and caused their common seal to be annexed to these presents, in *Baltimore*, the fourth day of April, one thousand eight hundred and thirty-one.

And also proved the order therein referred to as follows: memorandum, &c.

"4,500 dollars insurance is wanted on cargo of schooner *Argonaut*, *Captain Maginney*, at and from *St. Andreas*, with liberty of *two other* ports on the Spanish main, and at and from any of them to *Baltimore*, with a return for each port not used. *Captain Drinkwater*, of the schooner *Desiah*, arrived here a few days since from *San Blas*, and reports that the *Argonaut* sailed from *San Blas* for *St. Andreas*, about the *middle of February*, to trade, which is the latest account received of her proceedings. HENRY THOMPSON.

4th April.—3½ per cent. to return ¾ per cent. for each port on the main not used.

Agreed, for whom it may concern. H. T.

Also, the following deposition,—" Be it remembered, that on this 8th day of November, 1834, at the city of Baltimore, before me, personally appeared *Robert S. Upshur*, witness for the plaintiff, in a certain civil cause now depending in *Baltimore* county court, wherein *Joseph S. Bossiere* is plaintiff, and *The Maryland Insurance Company* is defendant—and deposeth and saith, that he was on board the schooner *Argonaut*, on her voyage from *Baltimore* to the *Spanish* main, in the fall of the year, 1830. She arrived at *Porto Bello*, on that coast,—in that port she discharged part of her cargo; how much, he cannot say, but remembers that some soap was landed. She left that place, sailed along the coast, touched at several places at which she landed articles and received money in pay for them, returned her course until off *Porto Bello*—did not enter, but landed some cargo there, and received money for it. From *Porto Bello* proceeded to *Chagres*, laid there two or three days, discharged some cargo, and received money in pay for it; from *Chagres* proceeded to *San Blas* coast, put in at *San Blas*, discharged one hundred barrels of tobacco for safe keeping, proceeded thence for *St. Andreas*—on her passage the vessel sprung a leak—took out some cargo at *St. Andreas* to discover the leak,—found and stopped it; cargo was sold, landed, and money received in pay for part of it, but does know that it was for all. From *St. Andreas*, proceeded to the *Spanish* coast or main,—on this passage the vessel sprang a leak the second time, and upon consultation, it was thought wisest to go into *Bocotoro*, and heave her out, which was done—this happened on Sunday. The cargo being all discharged for that object, she was then caulked, and the leak was properly stopped, and then cargo was taken again on board, and she proceeded to *San Blas*,—on her passage thither, deponent saw the town of *Chagres* on fire—touched no where on this passage before she entered *San Blas*—laid in this port one day and night,—in the morning, very early, got under way,—where bound, deponent did not understand rightly—but after getting pretty well clear of the land, found themselves among breakers,

where they were capsized—the cargo had shifted, and the vessel was completely useless—the wind and current set on shore, and they drifted on shore in that condition—it was about one hour before day-light when she struck, and bilged directly; we set all hands to work to save what we could—secured some cargo, and a trunk that contained some money—the amount this deponent does not know—the trunk was delivered into the care of the captain and mate, the supercargo having been drowned when the vessel was capsized—the trunk that contained the money was stolen from under the mate's head, and deponent saw, in the morning, some of the money scattered on the ground near the tent from which the money was stolen—the amount about seven or eight dollars; he does not know by whom the trunk was stolen—the tent was surrounded by the natives, who stole much of the cargo that had been saved or landed; deponent went and searched for the trunk in a swamp close by, but in vain. The natives showed so much hostility towards deponent and the crew generally, that they concluded that it was necessary to their own safety to depart—and they accordingly made the best of their way home. Deponent remembers that there was some tortoise shell on board the vessel when she was lost, and he recollects that they took some money on board at the first port at which they stopped, but does not know whether it was the custom or course of trade to take money or shells on board as returns of previous voyages, his station in the employ not having given him the opportunity of gaining such information. The cargo that was taken out at *St. Andreas*, but not sold, was replaced on board—he does not recollect the taking any tortoise shell on board,—it could not be taken on board without his knowing it;—he was absent on shore sometimes, however, and articles might have been brought on board without his knowing the fact. They had not convenient place to heave out at *St. Andreas* to repair; when the leak was attended to at *St. Andreas*, it was completely stopped; he does not recollect whether the second leak occurred in the same part or place—they had not reached the

Spanish coast when it happened; at the consultation, *Bocotoro* was considered the nearest and best place at which the vessel could be repaired. On quitting *San Blas*, before the vessel capsized, *her* course was homewards, being the same as if bound to *St. Andreas;* but he does not know her then destination. The trunk saved, that contained money, he thought from its weight, must have had several thousand dollars in it.

Also, the following commission and return, viz: &c.

[The reporters do not insert the evidence taken under this commission, because evidence of a similar tendency will be found in the other proof of the plaintiff, and because the commission in consequence of the substitution of the name of *Torquil Bowie* (by the alcalde who administered the oaths at *San Andreas* to the commissioners who acted,) for the name of *Duncan Bowie* which was in the commission when it issued from *Baltimore* county court, was rejected as inadmissible by this court.]

The plaintiff then called *Edward Maginney*, by whom he gave evidence, that he sailed from *Baltimore* as master of the schooner *Argonaut*, in November, 1830,—that he visited several places on the *Spanish main*, and arrived at *St. Andreas*, in December, 1830, or January, 1831, having sprung a leak on his passage from *Chagres* thither:—that, in order to repair the leak, he took out the cargo from the forward part of the vessel, removed as much as he could to the deck, landed the remainder, consisting of dry goods, one dozen chairs, three boxes shoes;—ascertained that the whole of the cargo was in good order. The leak having been repaired, the cargo was re-laden under the deck, including what had been landed, except a portion which had been sold, comprising the chairs and a small part of the shoes, and part of the dry goods. A quantity of merchandise, bullion and specie, that is, gold dust, old gold, specie, tortoise shell and cocoa, which had not been before on board the vessel were laden on board. There is no custom-house at *St. Andreas*. After a few days stay at *St. Andreas*, the vessel sailed for *Cordea* to trade, on nearing the place of her destination she sprung a leak; she then entered *Cordea*, for the purpose of inspecting

the leak, and getting provisions and water.—There examined the leak,—found that it was such as it was impossible to repair without heaving down, which could not be done there. Remained there no longer than was necessary to examine the leak, and chink it with oakum; left that place without trading, and keeping constant watch over the leak, sailed for *Boco del Toro*, the only place on the coast where there were any facilities for heaving down. Arrived there in about two days;—took out the cargo, loaded it on board *Captain Humphrey's* vessel, then in port, hove the *Argonaut* down, repaired her, reladed the cargo, which was then all found to be in good order, and immediately thereafter, on the third day from their arrival, set sail for *Cordea* upon their voyage, having gone to *Boco del Toro* for no other purpose than repair, and having remained there no longer than was necessary for that purpose, and not having traded, but paid for the repairs in money; on her arrival at *Cordea* they entered upon the business of the voyage, which the leak had before prevented them from attending to. Took in cocoa, tortoise shell, tobacco and specie, the tobacco having been landed there for the purposes of trade, when at the same place, previous to going to *St. Andreas*, and having remained there until now, when received on board the vessel. After a short stay at *Cordea* sailed for home, about eighteen miles from land and before she had shaped her course, or got clear of the reefs in the neighbourhood of the point of *St. Blas*, the vessel by a heavy sea capsized, all hands washed overboard, the supercargo drowned and the papers lost. After drifting twenty-three hours, struck, bilged and went to pieces, in spite of all exertions of the captain and crew. The cargo was lost, with the exception of a few articles of the value of about five hundred dollars. The witness picked up out of the sea, at the time of the wreck, a letter of instructions from the plaintiff to *Mr. Bowie*, the supercargo. The *Argonaut* sailed from *Baltimore* on a voyage to the *Spanish main*, and before her arrival at *St. Andreas* as aforesaid, had visited numerous ports and places of trade on the main;—had discharged two-thirds

of the outward cargo, and taken in nearly the whole of the homeward cargo, consisting of specie, gold and silver plate, cocoa, tortoise shell and gold dust, in pursuance of a necessary and invariable practice pursued by all traders who visit that country; to whom, as well as to all who have any knowledge of the trade, it is well known, that a cargo cannot be obtained at one, two, or three ports. The practice being to commence collecting the outward cargo at the first port of discharge, and to continue collecting it by way of trade or barter, at every place visited during the voyage, which are frequently very numerous, as also, to leave parts of the cargo in the hands of agents for sale at different ports and places, and to return and to collect the proceeds, thus using twelve or more ports on a voyage, and frequently the same port two or three times before completing the collecting of the cargo. The witness identified the following, as the letter of instructions picked up by him out of the sea at the time of the wreck, viz:

Mr. James D. Bowie: *Baltimore, Nov.* 20, 1830.

Sir,—You will proceed in the schooner *Argonaut*, *Captain Maginney*, to *Porto Bello* direct; there take your license for the coast, and sell all you can to the best advantage: from thence proceed to *Chagres;* lay off and on, and obtain all information you can relative to your business and the schooner *George;* make all the sales you can, and should you find it to my interest to send the *George* home direct from *Chagres*, by chartering her or loading her with hides on my account, do so; if not, insist on the captain's obtaining a license, and proceed with her immediately to *San Blas*, to load with cocoa nuts. You will render every assistance in your power with the *Argonaut*, to effect her loading, and despatch her as soon as possible. You have no occasion to be in the least fearful of any of the cruisers, shew your white signal and you will be known. After having despatched the *George*, and disposing of your tobacco, you will proceed in the *Argonaut* for the islands; land the articles for *Coln. Crofton* and your family, and sell any thing that you have left to the best

advantage. Should you have disposed of the tobacco, and while the *George* is obtaining her cocoa-nuts, you can run over to the islands and endeavour to obtain as much cotton as you can, to fill up the *George*, or for her deck load.

Should you be able to sail within a month from the Spanish main after the schooner *George*, you will take out of her all that she may have on board exceeding 2,400 dollars; remit bills of lading and invoice of the amount you will expect to bring home, valuing the articles the value in Baltimore.

J. S. B."

The plaintiff then called ——— *Penniman*, by whom he gave evidence that the above mentioned letter of instructions which *Maginney* had picked up out of the sea, is in his handwriting, and signed by the plaintiff, and is the original letter of instructions from the plaintiff to the supercargo of the *Argonaut*, and that he (the witness) was, at the time of the date thereof, clerk to the plaintiff. The plaintiff then called *Henry Thompson*, and gave in evidence by him, that he was the agent of the plaintiff in effecting the insurance, that he communicated with the defendants by means of the order above set forth, having no verbal communication with them. The report appended to the order relative to the *Argonaut*, was read by him in a paper, he presumes a *Baltimore* paper. After the loss he called on the president of the company, on or about the twenty-fifth of April, eighteen hundred and thirty-one, and communicated the fact of the loss to him: his reply was, they were not upon the risk at the time she was lost. They always resisted the payment on that ground. Had some communication with defendants during the summer, in July, what it was he does not know; but they always resisted the payment, expressing no desire to see any evidence, but resisting payment from the beginning as not upon the risk. The protest was left with the *Baltimore Insurance Office*, who were on the vessel on the twenty-fifth of April, and in July transferred to the *Maryland Office*, according to the usage of insurance offices in *Baltimore*. He supposes that it was not sooner transferred on account of some great

neglect in the secretary of the *Baltimore Office*, whose duty it was, according to usage, to transfer it. Upon reflection the witness stated, that he thought it probable, that the reason the protest was not sent to the *Maryland Office* was, the conversation above mentioned with the president of that office. On the next day the same witness was again examined, when he said that he had been thinking about the report. Is decidedly under the impression he saw it in a newspaper. Is perfectly satisfied he read the report in a newspaper. The reason that induces him to be positive is, that one morning he *told the plaintiff that the Argonaut had sailed from St. Blas;* that it was a good time to get insured; that he would not pay the notes for the outward cargo unless she was insured. *Bossiere* did not want to insure. Is as satisfied as possible that he derived *Drinkwater's* report from a newspaper. Though his memory sometimes fails him as to facts, he is not imaginative, nor does his memory supply him with facts which have had no existence. *Mr. Thompson* on the third day of the trial, stated, that he had not been able to find the paper, that therefore, notwithstanding the strength of his impression that he had read it in a paper, it was possible he might have got it from *Mr. Guerin*, a brother-in-law of the plaintiff, who was frequently at his counting-house, and communicated to him information respecting the *Spanish main*—that he confided in the truth of the report, or he would not have put it in the order, that is, he was confident that there was such a report in existence; he does not mean to say that he believed the facts stated in the report, as he knew nothing of *Captain Drinkwater*. He places the same confidence in the report now as he then did, and communicated the report in pursuance of the duty devolved upon him as agent for the plaintiff, of communicating the last accounts of the vessel, true or false. *Mr. Thompson* stated that he had considerable information of the course of trade on the *Spanish main*. That it is the custom to take in cargo at various ports along the coast, leaving cargo in return, and to commence the collection of the homeward cargo at the first port of dis-

charge, and continue it throughout the voyage. The plaintiff also gave evidence by *William B. Barney*, that he, the witness, read to *Captain Bossiere*, in the spring of eighteen hundred and thirty-one, a report of the *Argonaut's* sailing from some place, made by a *Captain Drinkwater* of the *Desiree;* that he recollects the circumstance particularly, from his calling *Captain Bossiere's* attention to it, as he had the paper in his hand near the exchange buildings. That he had not recalled the circumstance until he was asked by *Mr. Bossiere*, about a week ago, whether he had not made such a communication to him. That he does not recollect the name of the paper, thinks if he were to hear it he would recollect it,—it was published upon the Point. Upon "The Wreath" being mentioned, he stated that that was the paper.

The plaintiff also gave evidence by *Samuel Thompson*, that he, the witness, had been three voyages upon the *Spanish main;* he does not know whether there is a custom-house at *St. Andreas.* There was certainly none, and no custom-house inspection when he was there in eighteen hundred and twenty-seven? He was clerk of the vessel; the papers were in his possession; he did not deliver any of them to any body, neither bill of lading, nor invoice, nor any paper left the vessel. The course of trade is to begin to collect the cargo at the first port of discharge, the homeward cargo could not be collected at two or three ports.

The plaintiff also gave evidence by *John W. Greetham*, that he had been two voyages to the *Spanish main*, one six months, the other longer; supercargo both times; commenced collecting homeward cargo as soon as sales were made; met other vessels frequently; as far as he observed, they collected the homeward cargo the same way he did, it is the custom of the coast to load the cargo in this manner; this was an usual and necessary custom; the trader could not calculate on finding a cargo at three ports. A vessel could not collect a cargo without going round; at any one place could not get a cargo, nor at two or three; might use a dozen or twenty ports and return once or perhaps twice.

The defendants, to support the issue on their part, then called *Thomas Chappell* and gave evidence by him, that he had been four voyages to the *Spanish main*, not since 1826, does not know whether there is a custom-house at *St. Andreas* or not. Has been on the coast of *St. Blas*,—the trade is done by agents, who have small assortments left with them; on the vessel's return to the coast she finds the proceeds ready for her; any surplus unsaleable cargo, he leaves on the coast on his return home.

The defendants also gave evidence by *Christian Mayer*, that the custom of insurance on the *Spanish main*, is to port or ports, as in ordinary cases; the risk in this case commenced at *St. Andreas*, with liberty of two ports; knows of no custom which would determine the loading to take place before her arrival at *St. Andreas;* knows of no usage peculiar to this trade; has no knowledge of the trade except as an underwriter; a cargo on this voyage is collected as on other voyages; knows nothing to the contrary of the cargoes being collected at several ports, commencing to be laden at the first port of discharge, and continued at every port during the voyage.

The defendants further gave evidence by *Dr. Schwartz*, that he is acquainted with the trade as an underwriter, thinks that this policy would attach upon cargo taken in at *St. Andreas*, or any other of the ports in the policy, and on no other. Knows of no custom in this or any other trade, by which the policy would attach on cargo laden at any other port than those specified in the policy. Vessels from the *United States* generally make the voyage in four or four and a half months, unless the vessel is large. From the policy and order he would think that the inception of the risk was from the loading of the goods at *St. Andreas*. He has no knowledge of the trade but as an underwriter. Understands that cargo is disposed of, and returns collected from the inception of the voyage, at each port that the vessel arrives at; that it is collected in small portions at the different ports and stopping places; that there is a scramble for cargo from

the beginning of the voyage. Construing the order, he should deem that the construction of the order was, that the cargo was disposed of at the ports mentioned in the policy, and the goods collected there. Insurance in this trade is generally upon time, which has been the case for three or four years antecedent to this date.

The defendants further gave evidence by *John G. Chappell*, that he has never been on the coast, but has traded there by his agents. Now insures for time; thinks he began in eighteen hundred twenty-six or twenty-seven, but may be wrong as to the time. Average length of the voyage is from four to five months; has known longer and shorter. The liberty of going from port to port was largely asked for when insurance was not on time. Does not know any custom by which the policy is determined to have attached on goods laden before the arrival of the vessel at the first port in the policy; thinks it is the custom to begin to collect the cargo at the first port of discharge, and to continue at all the other ports during the voyage.

The defendants also gave in evidence a translation of the protest, which was admitted to be a true translation, and is inserted in a subsequent part of this bill of exceptions.

The defendants having objected to the reading of the testimony taken under the commission issued in this case to the island of *St. Andreas*, the plaintiff gave evidence by *Hugh Davey Evans*, one of his counsel, that he, the said *Evans*, applied to *David Stewart*, *Esquire*, one of the counsel for the defendants, to issue a commission by consent, to take testimony at *St. Andreas;* that *Mr. Stewart* refused so to do, and told him he must issue his commission adversely. That thereupon he consulted his client, filed his interrogatories, and named his commissioners; that through some mistake which he cannot explain, *Duncan Bowie* was of the names inserted in the list; that the plaintiff and himself both knew that *Duncan Bowie* was dead, he being the supercargo of the *Argonaut*, and drowned at the time she was wrecked; that the person who was intended, was the governor or principal person of

the island, the father of *Duncan Bowie*, whose name he now understands to be *Torquil Bowie*. The plaintiff also gave evidence by other witnesses, that *Torquil Bowie*, by whom the commission was executed, was the governor or principal magistrate of the island of *St. Andreas*, and that there was no person on the island of the name of *Duncan Bowie*. The court then permitted the commission to be read to the jury. The defendant excepted.

Whereupon the defendants, to sustain the issue on their part, proved by *Henry Thompson*, that he was the agent of the plaintiff, in effecting the policy in question, as well as the policy of the *Argonaut* out and home, and the policy on the cargo out to one port only; that the plaintiff was so satisfied with the safety of the voyage, that, as the premiums were high, he would insure the cargo out only, but when he was going to the *West Indies*, at the instance of the witness, he insured the homeward cargo by this policy. The vessel was insured out and home, at the *Baltimore Insurance Office*. The plaintiff, at the time the order for insurance in this case was given, was the owner of vessel and cargo.

The defendant further proved by the same witness, that on reflection, since his examination by the plaintiff, he believes it possible, that he may have derived the information as to the departure of the schooner *Argonaut* from *St. Blas*, given in the order for insurance, from *Mr. Guerin*, the brother-in-law of the plaintiff, who was in the habit of communicating to the witness the intelligence he might receive from the *main*, as he, *Guerin*, expected to go out to the *main* the next voyage. He, *Guerin* had been there on two or three voyages. The defendant further proved by the same witness, *that he did confide in the report of Captain Drinkwater, as stated in the order for insurance, and made his insurance on the faith of it, and that he did believe that the Argonaut had sailed from St. Blas for St. Andreas, as set forth in the statement*, and information given in the order for insurance, and that he *placed implicit confidence in the report*, or *would not have put it into the order*. The witness further stated, that he always

gives all the information in his power to the underwriters, whether for or against the application. The defendants then proved, by the testimony of *Christian Mayer* and *Augustus J. Schwartz*, the presidents of the *Neptune* and *American Insurance Companies*, of the city of *Baltimore*, and each of whom had enjoyed a long experience, as underwriters, with the business of *Baltimore*, that if an order for insurance, dated April 4th, 1831, was stated to be designed to cover a risk commencing at *St. Andreas*, on the 7th of January, 1831, the vessel would be considered a missing vessel, and would be regarded, unquestionably, as out of time, and the underwriter would decline the risk; and the defendant further proved by the same witnesses, that, according to the usage among underwriters, the whole of the order for insurance now shewn to him, (being the order upon which the policy in question was effected,) is considered together, and would influence the judgment of underwriters as to the risk, and the amount of the premium to be charged for it; they would act upon the whole paper as one order. The defendant then proved by *John G. Chappell*, that he is a merchant, and has been engaged in the trade to the *Spanish main* since the year 1823, or 1824, that he has knowledge of the usages of underwriters. In the year 1826, or 1827, he commenced insuring by policies on time; previously thereto, he had insured at *New York* on time, because premiums of insurance were so high in *Baltimore*. The average voyages to the *main*, out and home, are from four to five months; he has had them longer and shorter. Antecedently to effecting insurance on time, when he wished insurance on a trading voyage to the *main*, he asked for the liberty of ports and places between two designated points, in the most comprehensive language he could employ, and for the liberty to use them as often as he thought proper, without being held thereby to have committed a deviation.

The defendant then offered in evidence the protest of the *Argonaut*, made at the city of *Porto Bello*, on the 25th February, 1831.

And proved that the same was lodged in the defendants' office on the 26th day of July, 1831, and then gave in evidence the following letter of the plaintiff.

"WALLACE, Esq.

Pres't of Md. Ins. Co. BALT. *April* 3, 1831.

SIR,—I beg leave to request an examination of the enclosed deposition, &c. I forbear to make any comments, leaving it to the judgment and well known integrity of the gentlemen directing that institution to do me justice. I will be happy, at any time, to explain as far as I can, and produce the papers alluded to in the deposition, whenever the board or yourself choose to call for them.

With consideration, I remain yours, J. S. BOSSIERE."

And the *ex parte* deposition of *Captain Maginney*, enclosed in said letter.

"*City of Baltimore*, to wit: Before the subscriber, a justice of the peace in and for said city, personally and voluntarily appeared *Edward Maginney*, and he being sworn on the Holy Evangely, did depose and say, that he sailed, from *Baltimore*, master of the schooner *Argonaut*, on or about the seventeenth day of November last, (1830,) for *Porto Bello*, on the *Spanish main*, where he arrived about the fifth of December following; from thence he sailed about the eighth of the same month, (having taken thence a license to trade on the *Mosquito* and *Darien* coasts,) to *Gold* river, from that river he returned to *Porto Bello;* on or about the twelfth of same month, he sailed from *Porto Bello* to *San Blas*, where he arrived the day after, he stopped there about twenty-four hours, and then sailed for *Chagres*, from whence, after several days stay, he returned to *San Blas;* remaining there twelve hours, he sailed thence to *St. Andreas*, where he arrived on or about the twenty-seventh day of same month, (December,) from *St. Andreas* deponent returned to *San Blas*, some time in January following, and, after remaining at *St. Blas* trading until the fourteenth day of February following, on which day he left that place to return to *St. Andreas*, on his way to the *United States of North America;* but on the

fifteenth day of the same, (February, 1831,) while on the way from *San Blas* to *St. Andreas*, was struck by a heavy squall, at the same time that a heavy sea striking the schooner on the beam capsized her. The men were all thrown into the sea, but saved themselves by swimming and clinging to the wreck, with the exception of the supercargo, *Mr. Bowie*, who was drowned. In this state, deponent and his crew drifted with the vessel to the shore, at a place called *Tump*, thirty miles from *Porto Bello*. Deponent there made an endeavour to save the cargo, but, while so employed, a number of armed soldiers, and from the town of *Halauen*, peasantry, attacked and plundered them. Deponent being unable to resist the outrage, went, on foot, with one of his crew to *Porto Bello*, and complained to the mayor of that place, who sent an order to the magistrates of *Palama* to put a stop to the outrage, and punish the offenders, and return the property. But, as the magistrates themselves had been engaged in the plunder of the goods, the only effect of this order was, to put a stop to the open and violent character of the robbery, which continued to be carried on with more secrecy, but in such a way, however, as to be evident to every body. A small quantity of goods and gold, all that could be saved from such rapacity, was carried to *Porto Bello*, and there sold by the mayor of that place, as appears by the account sales rendered by him, and brought on to *Baltimore* by this deponent. EDWARD MAGINNEY."

Evidence was then offered of the value of the goods on board the *Argonaut*, at the port of their shipment:

And thereupon the defendants, by their counsel, prayed the court to give to the jury the following instructions:

"1. That the order for insurance, in this case, was calculated to induce in the defendants a belief that the voyage for which the goods mentioned in the policy was asked to be insured, was a voyage at and from *St. Andreas*, with liberty of two other ports on the *Spanish main*, and at and from any of them to *Baltimore;* to commence about the middle of February, 1831, or a short time thereafter; that said order

being expressly referred to in the policy, is thereby made a part of it, and that both together form the contract between the parties, according to the true construction of which, the voyage thereby intended to be insured, was the voyage just described, to commence, as aforesaid, about the middle of February, 1831, or a short time thereafter, which intention governs the contract; and there being no proof in the cause, that the voyage, in which the loss occurred, and for which this action is brought, did commence at that time, but, on the contrary, the only proof being, that said voyage commenced the latter end of December, 1830, or beginning of January, 1831, the risk insured by the policy in this case never had an inception, and the jury are consequently bound to find their verdict for the defendants.

"2. That the order for insurance in this cause, being expressly referred to in the policy, is thereby made a part of it, and that both together form the contract between the parties; that the fact stated in said order, that the *Argonaut* sailed from *St. Blas* for *St. Andreas* about the middle of February, to trade, constitutes a warranty that the said schooner was to commence the voyage insured by said policy, not sooner than the middle of February aforesaid, and that the only proof in the cause being, that the voyage in which the loss occurred, and for which this action is brought, did commence the latter end of December, 1830, or beginning of January, 1831, the said warranty has not been complied with, and the jury are consequently bound to find their verdict for the defendants.

"3. That assuming the policy in this case, to cover the voyage proved by the evidence in the cause to have commenced at *St. Andreas*, the latter part of December, 1830, or beginning of January, 1831, the said policy only attached upon the homeward cargo, actually laden as such on board said schooner, either at *St. Andreas* or *Cordea*, and that, therefore, the plaintiff is not entitled to recover for any part of the goods and merchandise which were actually on board said schooner at the time of her arrival at *St. Andreas*, even

though the jury shall believe, that part of said goods and merchandise were landed at *St. Andreas*, and put again on board said schooner before her departure from that place, in the manner given in evidence by the plaintiff.

"4. That the insurance in this cause being at and from *St. Andreas*, with liberty of two other ports on the *Spanish main* and *Baltimore*, if the jury believe that said schooner sailed on said voyage from *St. Andreas* and proceeded to *Cordea*, from thence proceeded to *Boco del Toro*, and afterwards returned to *Cordea;* that, in so returning to *Cordea*, there was a deviation which vitiated the policy, and discharged the defendants therefrom, unless the jury shall believe that the sole and only motive for going to *Boco del Toro* was for repairs indispensably necessary for the schooner's immediate safety, and which could not be made at *Cordea.*

"5. That the insurance in this cause being at and from *St. Andreas*, with liberty of two other ports on the *Spanish main* and *Baltimore*, if the jury believe that said schooner sailed on said voyage from *St. Andreas* and proceeded to *Cordea;* from thence proceeded to *Boco del Toro*, and afterwards returned to *Cordea*, that, in so returning to *Cordea*, there was a deviation which vitiated the policy, and discharged the defendants therefrom, even though the sole and only motive for going to *Boco del Toro* was for repairs, if the jury believe that said schooner, when she sailed from *St. Andreas* on said voyage, was unseaworthy.

"6. That the order for insurance in this cause is, in law, a represention that the *Argonaut*, the vessel insured, had sailed from *St. Blas*, for *St. Andreas* about the middle of the preceding month of February, to trade, and if the jury believe that the said vessel did not sail according to said representation, then the same is falsified, and the plaintiff is not entitled to recover, unless the jury shall believe that the fact so represented was not material to the risks insured against, and that the plaintiff did receive the information stated in said order, as it is so stated either directly or indirectly from *Captain Drinkwater*, and that he confided in its truth.

"7. That in estimating the partial loss, if any, in this case, the jury are bound to estimate the goods covered by the policy, at their value at the places where they were shipped respectively, and not their value at *Baltimore*.

"8. That the court direct the jury, that the policy in this case did not cover or attach upon the tobacco taken on board at *Cordea*, after the arrival of the schooner at that place from *Boco del Toro*, as given in evidence by the plaintiff.

"9. The defendants pray the court to instruct the jury, that if they believe that the amount of the partial loss in this case, could not be ascertained from any papers or documents, submitted by the plaintiff to the defendants, the plaintiff is not entitled to interest upon any amount of partial loss which the jury may find by their verdict." Refused, but granted with this qualification. "Unless the jury shall also believe, and shall so find from the evidence, that the failure by the plaintiff, or by his agent, to submit papers or documents to the defendants, showing the amount of partial loss was occasioned by a rejection by the defendants of the claim of the plaintiff, not on account of the non-production of such papers and documents by the plaintiff, but merely because the defendants contended that the policy had not attached at the time the vessel was lost, and upon that ground alone, refused to pay any loss, in which last event the plaintiff is absolved from the operation of any stipulation in the policy which might have barred him from recovering interest, and his right of action accrued immediately upon such refusal of the defendants to pay any loss, and he is therefore entitled to recover interest from the date of such refusal."

And the court (*Magruder, J.*) accordingly gave the prayers, Nos. 3, 4, 5 and 7.

But refused to give the prayers, Nos. 1, 2, 6, 8, 9.

And the defendants, by their counsel, prayed leave to except to such refusal.

And the plaintiff on his part prayed leave to except to the instructions of the court, granted as herein before mentioned,

at the instance of the defendants, see defendants' prayers, Nos. 3, 4, 5 and 6.

And the plaintiff thereupon, after all the above testimony had been given, as stated in the defendants' bill of exceptions, by his counsel, moved the court to give to the jury the following instructions.

"1. That the order for insurance given in evidence in this cause, does not contain a warranty of any fact whatever, that the statement appended to the order, and relied on as a warranty by the counsel for the defendant, is merely a representation annexed to the order, that such a report as is therein mentioned had been made, and if the jury believe that the said representation was made with a *bona fide* intention of communicating to the assurers all information of the knowledge of the assured, and was in fact a true statement of a fact which had come to the knowledge of the assured, then such representation is sufficiently complied with.

"2. That the true construction of the statement appended to the order, is not that the voyage insured was to commence about the middle of February, or shortly afterwards, or at any other time, and that, even if regarded as a warranty included in the policy, it has no such import, on the contrary, that whether regarded as a representation or warranty, it only imports, that the *Argonaut* had been reported in the manner therein stated, as having sailed from *St. Blas* to *St. Andreas*, and not that the report was true.

"3. That the order being for an insurance at and from *St. Andreas*, without mention therein of the place of lading the goods, an insurance upon a cargo laden only at *St. Andreas*, is not an insurance agreeable to, or consistent with the order, and the order being incorporated as a clause in the policy, and being a written clause, overrules and controls the printed clause relative to the insurance being upon goods laden at *St. Andreas*, and there was consequently no necessity for lading any portion of the cargo there, for the purpose of giving an inception to the risk.

"4. That the order being for an insurance at and from

St. Andreas, without any mention therein of the place of lading the goods, if the jury should believe that the usage of the trade was not to take in the cargo at *St. Andreas*, an insurance upon a cargo laden only at *St. Andreas*, is not an insurance agreeable to, or consistent with the order, and the order being incorporated as a clause in the policy, and being a written clause, overrules and controls the printed clause relative to the goods being laden at *St. Andreas*, and there was, consequently, no necessity for lading any part of the cargo there, for the purpose of giving an inception to the risk.

"5. That if the jury should believe that any portion of the cargo was put on board at *St. Andreas*, it is a sufficient lading to ascertain the inception of the risk, within the true intent and meaning of the policy.

"6. That the object of requiring a lading to take place at the port where the risk is to commence, being only to ascertain the condition of the cargo, if the jury believe the condition thereof to have been ascertained to have been good by a subsequent examination, the legal necessity of any such lading having taken place is done away.

"7. That the object of requiring the fact of a lading, at the port at which the risk is to commence, as necessary to its inception, being either as a means of ascertaining the moment of such inception, or as a means of ascertaining the good condition of the goods, or both, those objects are sufficiently attained in this case, if the jury shall believe that any part of the cargo was laden at *St. Andreas*, and that the good condition of the whole was sufficiently ascertained, either at that place, or after sailing therefrom, and before the loss.

"8. That if the jury believe, that the insurance was on the cargo of the *Argonaut*, on her homeward passage, she having been on a trading voyage on the *Spanish main*, and that the assurers were acquainted with those facts, and if they further believe the usage of trade to be, to commence the collection of the return cargo immediately upon the first

arrival of the vessel upon the *Main*, and to continue the same throughout the voyage as opportunities may offer, then the policy attaches upon all goods on board the *Argonaut*, whether laden at *St. Andreas* or elsewhere, during the voyage, whether before or after her being at *St. Andreas*."

And the court accordingly gave the following instructions, viz: Prayer No. 1, granted. Prayer No. 2, granted. Prayer No. 5, granted, with the following qualification.—"Provided, the jury shall find that such portion of cargo so put on board at *St. Andreas*, was not a part of the goods and merchandise which were actually on board said schooner *Argonaut* at the time of her arrival at *St. Andreas*, and there landed and put again on board said schooner before her departure therefrom, but were other goods actually laden on board the said schooner at *St. Andreas*."

And refused the plaintiff's prayers, Nos. 3, 4, 6, 7 and 8.

Whereupon the plaintiff, by his counsel, excepted to all the opinions of the court, wherein any of the prayers of the defendants were granted, and to all the opinions of the court wherein any of the prayers of the plaintiff were not granted.

The jury found a verdict for the plaintiff, and both parties appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY, CHAMBERS, and SPENCE, Judges.

D. STEWART, for the appellant, said upon the appeal of the *Insurance Company:*

1. That the risk insured never commenced.

2. That if it did commence, the jury were bound in finding the amount of the loss—to estimate the goods covered by the policy according to their value at the places where they were respectively shipped, and not according to the value at *Baltimore* had they arrived in safety.

On the appeal of the plaintiff below he insisted, that admitting for the purpose of the question, that the policy covered that part of the voyage which commenced at *St. Andreas* to the latter end of December, 1830, or beginning

of January, 1831, that it attached only on so much of the homeward cargo as was actually laden on board for the first time, either at *San Andreas* or *Cordea*, and did not cover that part of the cargo on board said schooner at the time of her arrival at *San Andreas*, or that which was landed there and put again on board before her departure.

The controversy will mainly turn on the order for insurance of the 4th April, 1831, which represents the vessel as at *San Blas* on the 14th February, 1831. She sailed from *San Blas* towards *San Andreas* on the 15th February, 1831, on which day she was wrecked. Hence, as she was to be insured from *San Andreas*, we contend the policy never attached. In this contract parties should meet on the same ground. We look to the order, and ask what was intended to be insured? what voyage was it. The counsel here examined the facts to show that *Bossiere* intended the voyage to commence at *San Andreas* on the homeward voyage, a spring voyage. He sought insurance at and from *San Andreas*, to which port the vessel was bound by the statements in the order. The ship must be ready to pursue her voyage and be at the terminus *a quo* before the risk attached. *Robertson and Thompson vs. French*, 4 *East.* 130. *Williamson vs. Innes*, 21 *Serg. and Low.* 229, 245. If the terms of the order are so ambiguous, that one party would look to the commencement of a voyage at one period, and another party intended another period, it would be discharged on the ground of mutual mistake. The aggregatio mentium, indispensable in contracts never took place. *Hull vs. Cooper*, 14 *East.* 479. As to the admissibility of the commission in evidence, we contend the court will not suffer the substitution of a commissioner not of, for another of, their appointment. Commissioners are officers of the court, act under the authority of the court, nominated ex parte, and particularly appointed by the court. The party who takes out an ex parte commission runs all the risks of accident. *Cappeau's Bail vs. Middleton and Baker*, 1 *Har. and Gill*, 154, 158. *Guppy, et al, vs. Brown*, 4 *Dall.* 410. No oaths were administered by the commissioners which is error. 1 *Wash. C. C. R.* 44. *Bailis*

vs. Cochran, 2 *John. Rep.* 417. If a clerk be appointed he must be sworn by the commissioners—but here all the oaths were administered by the alcalde, and finally an interrogatory not sent was put and answered before the commissioners, in which they transcended their authority.

EVANS, for the appellee, contended:

1. That the voyage insured commenced on the first arrival of the *Argonaut.*

2. That the order is only a statement of information for the benefit of the insurers, which information is that the report mentioned in the order had been made, and not that it was true.

3. That the policy attached on the tobacco shipped at *Cordea.*

4. That the jury were not bound to estimate the goods agreeably to their value, at the places where they were shipped respectively.

5. That the jury had a right to calculate interest upon the amount of partial loss if the defendants objected to the preliminary proof solely because the policy had not attached.

6. That the policy attached upon all the goods on board the vessel, where ever shipped.

7. That the order is not a representation that the *Argonaut* sailed from *St. Blas* about the middle of *February* for *St. Andreas.*

He insisted that the question argued by the opening counsel of the appellants was more general than that presented by the prayers offered to the county court.

There is no question about deviation open to the company, their prayer on that head was granted below.

The order does not bind the insured to a voyage commencing after the middle of February.

The point that the policy never attached was not brought up under the act of 1825.

There is no proof of concealment—no proof that *Bossiere* had information about the course of the voyage. No proof

of a missing ship. Not a winter voyage. Both parties stood on an equal footing. It was a voyage to and fro, and beginning the homeward part of it not susceptible of ascertainment.

The prayers relied on below insist that the order uses terms of description—representation or warranty, and are framed to meet one or the other of those views. There being the case within either of those three classes, an intention must exist to use the terms for the one or the other of those purposes. The agreement must be considered by itself. The intention collected from it alone. For here is no fraud nor latent ambiguity.

The case in 4 *East.* 130, was one of express stipulation—a part of the description of the voyage, and so indicative of intention.

The case of 1 *Serg. and Low.* 229, was of a policy on freight. That in the same volume, 241, only decides, that the policy does not attach on a voyage delayed for a year.

We contend that the commission was properly executed. The person intended by the plaintiff in fact acted. The decision in 1 *Har. and Gill*, 154, 158, has no effect here. There the commissioner, abandoned his duty and handed the proceedings over. Here the party intended to be intrusted did the duty. If we ask who had the confidence of the court, the reply is neither the one named, nor he who acted. There is proof of an accountable mistake, and this is not a commission by agreement, but taken adversely upon the action of the plaintiff alone. Then the question is merely whether a mistake in the name of the commissioner, when he who was designed to be entrusted did the duty, is a fatal mistake. Is the strict doctrine of misnomer to be applied here? The case of *Cappeau and Baker* sheds no light on this question. Then as to the oaths, the counsel for the appellant is mistaken in the fact. The depositions may be taken before both commissioners. The act of the Alcalde in administering the oath may be treated as surplusage. His concurrence cannot make the commission worse. It appears substantially that the oaths were taken by and before the commissioners. If done in their presence and by their direction, it was done by them.

The case in 2 *Har. and Gill*, decides that a clerk was unnecessary. The court will presume that the clerk was sworn if the contrary does not appear. The new interrogatory was mere surplusage—and lastly, the whole commission was unimportant. It had no tendency to procure a verdict one way or the other, and therefore forms no ground for a reversal.

R. JOHNSON, on same side.

The cause as argued on the other side presents two questions:

1. Did the policy in fact attach on the risk?
2. Was the commission admissible in evidence?

No authority has been cited to establish that in this order there is either a warranty or representation.

I assume there is neither concealment in fact, nor warranty in law, nor representation in law in this record.

Then are there any other questions in this record than those conceded to be correctly decided below.

The policy it is said never attached, because the voyage never did take place. The object of the insurance was to cover the return cargo on board this vessel, and to begin at *St. Andreas*. If return cargo was on board at *St. Andreas* and lost, and if the assured cannot recover, then the indemnity fails.

The record shows the voyage was out and home, that the outward cargo only was insured. It was necessary to insure the homeward cargo. The court decided there was neither waranty nor representation in the order, and the plaintiff insisted that the policy covered goods at *St. Andreas*, *whenever* shipped, but the court held it was return cargo, goods for the first time shipped at *St. Andreas*. It was return cargo put on board there with liberty to touch at one or two other ports. The jury determined within the proviso of the court's opinion, that goods for the first time shipped at *St. Andreas*, to be part of the homeward cargo.

Leaving *St. Andreas*, the vessel started for the *main*, and only used one port, *San Blas*, and starting from *San Blas*

bound to *San Andreas*, and *before* arriving at the point of deviation, at which a vessel bound from *San Blas* to the *United States*, would depart from the route of the voyage from *San Blas* to *San Andreas*, the loss occurred. From *San Blas* to the place of loss, was a route common to vessels bound from that port, either to the *United States* or *San Andreas*. An intention to deviate is not fatal to the right of recovery. A loss occurring before the point of an intended deviation is reached, must be paid for. A mere intention is no deviation. *New York Insurance Co. vs. Lawrence*, 14 *John.* 46. *Lawrence vs. The Ocean Insurance Co.* 11 *John.* 241. The case is this; a return cargo is intended to be covered. It is purchased and shipped. The vessel has the liberty of two ports after leaving the port of shipment. She touches at one. There is an intention to deviate in the further prosecution of the voyage, but the loss occurs before that intent is carried into operation, the loss must be paid for.

Then it is argued the voyage had not commenced. But let us suppose, that after leaving *San Andreas*, she never reached *San Blas*, and the fact of sailing from *San Blas* to *San Andreas*, stated in the order untrue, now as this statement is neither warranty nor representation, would not the underwriters have had to pay for the loss? If such a representation was not material, the only inquiry would be was the cargo within the policy?

The only escape from this result is proof of a design to carry the return cargo shipped at *San Andreas*, to some other port than *Baltimore*.

The proof of the captain is that the vessel was coming home. She leaves *San Andreas* with a homeward cargo, touches at *San Blas*. Sails from *San Blas*, and before the point of an intended deviation is reached, a loss occurs. For this we could recover. Indeed we were entitled to recover for outward cargo landed at *San Andreas*, and then re-shipped for *Baltimore*, as this in point of law would be return cargo.

If the representation is struck out of the order, and it

stood at and from *San Andreas*, with liberty of two other ports and home, then as to return cargo the plaintiff could certainly recover.

The truth of the representation as stated is not denied. The construction put by defendants makes the representation defeat the application, as that it must be cargo shipped only after her return to *San Andreas*, and after leaving *San Blas*.

The object was to cover cargo laden at *San Andreas*, in the whole of its transit from that port to two other ports and home. On the first prayer, the question of cargo laden at *San Andreas* for *Baltimore*, is not in this instruction, and there being proof of a shipment, it insists that although a shipment the risk did not attach. It puts the right to recover for a loading in the month of February, now if this representation is not material, we are entitled to stand as if it was out of the cause. Time is made material in their first and second prayers.

The third prayer puts the case to the jury upon a particular hypothesis of facts, and denies the right of the plaintiff to recover at all, now if this hypothesis did not cover the whole rights of the plaintiff, it is error to grant it. Under this prayer the defendant contends, that as the vessel had not reached *San Andreas*, and the plaintiff did not intend to insure her until she reached, meaning to stand his own underwriter till that event. Suppose the defendant correct in law, and that in fact, the vessel was not on her voyage to *San Andreas* the second time, but had left *San Andreas* for *Baltimore* by way of *San Blas*. If true that the policy contained neither warranty nor representation of the time of sailing, and the plaintiff is, (see the master's evidence,) that she sailed from *San Andreas* to *Cordea*, a port of privilege by the policy and started from *Cordea*, for a homeward port, we may sustain this judgment, though there is countervailing proof. The policy attached if the jury found the captain's proof to be true. Under this state of proof the court could not take the cause from the jury. The prayer of

not entitled to recover, must be upon a hypothesis of the truth of every fact variant from the master's proof.

We next inquire whence comes the evidence of the intention, that the voyage was to commence after the vessel's arrival at *St. Andreas*, and after February, 1831.

The policy professes to cover all return cargo laden at *St. Andreas*. The only evidence of the period at which it is to commence is found in a reference to the order for insurance.

The order is only evidence in cases of representation and warranty. It is only in such cases that it can be used. *Dow vs. Whetton, et al*, 8 *Wend.* 160. The application for insurance is not evidence of the intention of the parties. At law it is used to shew misrepresentation. In equity it may be used to correct the policy. *Dow vs. Whetton, et al*, 8 *Wend.* 163, 173.

In cases of no representation nor warranty, the policy alone is the evidence of the intention of the parties, and the language there is too clear for controversy.

As to the commission, the introduction of an additional interrogatory by the commissioners is ground of objection to that only, as to the mode of executing commissions he cited. *Wilson vs. Mitchell*, 3 *Har. and John.* 91. *Walkup vs. Pratt*, 5 *Har. and John.* 51.

But I contend this court will not reverse nor send the cause back, when they see the judgment is correct. The evidence independent of the commission proves the case. The proof in the commission does not even add to the weight of the other proof, indeed the defendant offered on his part, all the proof which the commission contained. Then the admission of the commission as evidence is wholly immaterial.

Meredith, for the appellant, in reply.

The whole case rests upon the intention as to what risk the policy attached on. The underwriters allege that the voyage they intended to insure was not the voyage on which the loss occurred. The ascertainment of this intention may

depend on warranty, and in the absence of warranty, may, and must depend on intention, as you may collect it from the policy or the order, or from circumstances *dehors* the contract.

It is true in the order, you find a report that the schooner had sailed from *San Blas* to *San Andreas*, for the purposes of trade, on looking at this order it would strike a judicial mind, a professional man, that it looked very much like a representation. I admit there is no misrepresentation in the order. The representation is true, true as a report, true in fact, looking to the fact. The report as stated in the order is proved to be true, all the evidence in the cause concedes its truth, consider in any light the report is true as stated. And it marks an intention to insure a voyage not to commence earlier than February, 1831.

There may be a misdescription of a voyage independent of either warranty or misrepresentation. There are a variety of cases with reference to the commencement of the risk, whether in point of time or at all, which arise from contract. *Marshall*, 322, and cases there cited. *Driscoll vs. Passmore*, 1 *Boss. and Pull.* 200.

We insist the case depends on intention to be collected from the terms and language used in the contract, as in all other cases, the intention of both parties must concur. If different, each having a different object, then it is a case of mutual mistake not binding on either party. 1 *Pothier*, 12. There is a case which illustrates this position. An insurance was effected in *Boston*, on a ship for a whaling business. The owner of the ship and the ship were in *New York*. In the *order* the ship was described as a *coppered ship*. This term was equivocal. In *New York* it meant a ship coppered to the bends. The keel and false keel not coppered. It meant in *Boston*, *in a whale ship*, a ship coppered bottom and sides of both keels. The insurance was effected in *Boston*, and the assured was bound by the construction there given to the order. But the court also held, as there was no fraud, no intention to deceive, as parties meant different things there was no contract, no contract *ad idem*. A mutual mistake not

binding. Then if the company intended to underwrite a voyage commencing from *San Andreas*, not later than the middle of February, then the intention of the assured becomes immaterial and the intent of the underwriter being established, the policy is at an end.

How is this intention to be ascertained? The first prayer puts the intention on the ground of contract made up of the policy and the order, and these are the foundations of the intention of the parties to this written contract. It is not a matter of fact, but a question of construction and to be made by the court. And if the intention here imputed was that of one of the parties, then there was nothing open for inquiry by the jury.

This order without the report as derived from *Captain Drinkwater*, establishes an intent, to underwrite a voyage not commencing earlier than the middle of February. Here the order is inserted in the policy. It is settled that it is a part of the contract. It often operates to control the contract, as where the language of the policy differs from that of the order. *Winingder vs. Diffenderffer*, 5 *Gill and John.* 187. The words *at and from San Andreas*, indicate the intention. How are these words to be understood? If they have a technical meaning, their familiar signification yields to it. *Robertson and Thompson vs. French*, 4 *East.* 135. Usages interpreted by judicial decisions are taken in the peculiar sense ascribed to them. Now, technically what do *at and from* mean. These mean that the vessel was at the place when last heard from, or *shortly* expected there, not at an indefinite distant day, and if they do not import that the vessel was to arrive at a distant day, then they do not import that the arrival had ocurred at an antecedentally distant day, for in such case she might be a missing vessel. If not so, the underwriter would in all such cases be made to take the part of a missing vessel. The words *at and from* import that the *Argonaut* was at *San Andreas*, or shortly to be there, and as the insurers are presumed to have knowledge of the course of trade and meaning of such terms, so have they

knowledge of a design to insure a voyage to be commenced in conformity thereto.

These views are confirmed by the statement of *Drinkwater's* report contained in the order, and the underwriter had a right to regard that statement, as a circumstance indicating the voyage intended to be insured.

The counsel here proceeded to argue from the letter of instructions to the supercargo, and the nature and course of this branch of trade in which the appellee had been engaged, that he designed at first to insure the voyage as contended for by the insurance company, and concluded his argument, insisting that as the commission tended to corroborate some portions of the proof, otherwise suspicious, and as the court could not determine what effect it might have had upon the jury, its admission as evidence was error.

STEPHEN, Judge, delivered the opinion of the court.

This case comes up upon an appeal from the judgment of *Baltimore* county court, rendered in an action of covenant, instituted in that court upon a policy of insurance, executed by the appellant, for the appellee, upon the return cargo of the schooner *Argonaut*, at and from *St. Andreas* to the port of *Baltimore*, with the liberty of two other ports on the *Spanish main*, and at and from any of them to *Baltimore*, with a return for each port not used. The parties to this controversy, differ about the true construction and operation of this policy, as to the voyage it was intended to cover. The *Argonaut* it appears by the proof in the cause, sailed from the port of *Baltimore* about the middle of November, 1830, for the *Spanish main*, and after visiting several places on the *Spanish main*, arrived at *St. Andreas*, according to some of the proof in December, 1830, or January, 1831, or as proved in another part of the testimony, on or about the 27th day of December, 1830. From *St. Andreas*, she proceeded to *Cordea* and *San Blas*, where she traded, and after leaving *San Blas* was lost by the perils of the sea, having capsized, and as proved by the captain, she went to pieces. In the depo-

sition of *Captain Maginney*, which was inclosed in a letter by the assured, to the president of the *Maryland Insurance Company*, and given in evidence upon the trial—it appears that the *Argonaut* was at *San Blas* on the 14th day of February, 1831, on which day she left that place for *St. Andreas* on her way home, and on the 15th of the same month was struck by a heavy squall of wind, capsized and lost. It is to be observed that this testimony corresponds with the report of *Captain Drinkwater* on his arrival from *St. Blas* at *Baltimore*, and which report was contained in the order or proposal for an insurance. That order is in the following words:

"4,500 dollars insurance is wanted on cargo of schooner *Argonaut*, *Captain Maginney* at and from *St. Andreas*, with liberty of two other ports on the *Spanish main*, and at and from any of them to *Baltimore*, with a return for each port not used. *Captain Drinkwater* of the schooner *Desiah*, arrived here a few days since from *St. Blas*, and reports that the *Argonaut* sailed from *St. Blas* for *St. Andreas* about the middle of February to trade—which is the last account received of her proceedings."

Upon this order the insurance was effected, and when the policy was executed the order was referred to and adopted as a part of it. The vessel and the greater part of the cargo having been lost after she left *St. Andreas* on her first arrival at that port, and before her second contemplated arrival when she was lost. The true construction of this policy becomes vitally important to the parties in this case, as upon it depends, the right of the assured to claim an indemnity for the loss he has sustained. After a careful consideration of the arguments which were urged in behalf of the respective parties to this controversy, we have come to the conclusion that the underwriters are not responsible for the loss which the assured has sustained, because we think that according to the true construction of their contract, the loss occurred before the inception of the voyage, which the policy was intended to cover; and consequently before the risk commenced, which

they intended, and did in fact, assume. In the construction of the contract of insurance, as in all other cases, the intention of the contracting parties is to be regarded, and when it can be ascertained, it must govern and control their rights under it. The order being adopted into the policy, forms a part of it, and must of course be adverted to, and considered in giving a construction to the policy in this case. It is a well established principle in the law of insurance, that the underwriters are presumed to be acquainted with the nature and course of the voyage which they undertake to insure, and it is in proof in this case, that the vessel arrived at *St. Andreas* on or about the 27th of December, 1830, and left there a few days thereafter, and the insurance was effected on the 4th of April, 1831. If these facts had been known to the Insurance Company at the time the application for insurance was made, it is proved by the presidents of two Insurance companies, gentlemen of long and extensive experience upon such subjects, that the vessel would have been considered out of time, and the risk would according to common practice or usage in such cases have been declined. Such a risk then, it is fairly to be inferred would not have been assumed by the insurers in this case, if these facts had been known by them at the time they subscribed the policy. Nor do we think that such an insurance would have been suggested by the interest of the insured under the circumstances given in evidence, nor could the underwriters have supposed that such a risk was asked to be assumed. The vessel had left that port and had performed a great part of the voyage; had visited and traded at two of the ports to which she was privileged to go according to the terms of the policy, and in going to *St. Andreas* a second time, would have been guilty of a deviation, which would have vacated the contract of insurance, and discharged the underwriters. In giving a construction to this policy, it is moreover to be borne in mind, that the underwriters were distinctly and explicitly informed by *Mr. Thompson*, the agent of the assured, in the order for the insurance, that *Capt. Drinkwater* of the schooner *Desiah*,

had arrived a few days before at the port of *Baltimore* from *San Blas*, and brought intelligence that the *Argonaut* had sailed from that place for *St. Andreas* about the middle of February to trade, which was the latest account received of her proceedings. What was the object of the communication of this intelligence? The insurance asked for was to be on the cargo, at and from *St. Andreas*, with liberty of two other ports on the *Spanish main*. The object of the communication of the report of *Captain Drinkwater* was therefore, to give them the latest intelligence of the schooner, and when they might calculate upon her arrival at *St. Andreas*, that they might estimate the risk they were asked to assume accordingly. It was therefore, we think, clearly the intention of the underwriters in this case, and such is the legal effect, construction, and operation of the policy, on which this suit was instituted, that it was to attach, and the risk to commence on the arrival of the vessel at *St. Andreas*, on her sailing from *St. Blas*, as reported by *Captain Drinkwater*. *Mr. Thompson's* communication of this information to the underwriters, was we think, evidently intended to describe and define with certainty and precision the voyage to be insured, and to obviate all mistake and misapprehension upon the subject of the risk he asked to be assured. There are other views which might be taken of this case, strikingly illustrative of what must reasonably be supposed to have been the intention of the parties to this contract, but it is deemed unnecessary further to enlarge the discussion or enter into a more detailed reasoning upon the subject. The application for insurance in this case was made on the 4th of April, 1831, and information of the report brought to *Baltimore* by the *captain* of the schooner *Desiah*, was very properly communicated to the underwriters, not only to enable them to estimate the risk they were asked to assume by forming an opinion as to the period when it would be likely to commence by the arrival of the vessel at *St. Andreas*, but also to describe and ascertain the voyage they were asked to insure.

The *first* prayer therefore made to the court by the counsel for the insurers, for their instruction to the jury, having taken an erroneous view of the true construction of the order for insurance, was properly rejected by the court; and we think that such refusal presents no ground for a reversal of their judgment; but we think that the court clearly erred in suffering the testimony taken under the commission to *St. Andreas* to be read to the jury. *Torquil Bowie*, who was associated with one of the commissioners in the execution of the commission, acted without authority; he derived no power for such a purpose from the court by whose order the commission was issued to the commissioners originally named therein. The commissioners are the depositories of the confidence of the court; it is a special trust and confidence reposed in them, and cannot be transferred, delegated, or usurped by another. It is moreover, a special authority, and must be strictly pursued.

We think also, that the court erred in suffering the testimony taken under the *ninth* interrogatory to go to the jury, it being propounded by the commissioners without authority, and it is impossible for this court clearly to appreciate the influence or weight which such improper and illegal testimony may have had with the jury in the formation of their verdict. For these reasons we think that the judgment rendered by *Baltimore* county court was erroneous, and ought to be reversed; but as the loss occurred in this case before the policy attached, or the risk commenced, no *procedendo* will be ordered.

JUDGMENT REVERSED.

SOLOMON M. HANNEY *vs.* SARAH MURRAY.—*December*, 1837.

If the appellant die before the commencement of the term, to which the appeal is taken, the appeal will abate.

APPEAL from *Chancery.*

At this term the appellee suggested the death of the appellant, and filed the affidavit of one *Joshua Tipton*, made before a justice, certified by the clerk of *Carroll* county court, deposing that *Solomon M. Hanney*, the appellant, died on or about the 28th November, 1836.

It appeared from the record that a final decree was passed by the chancellor, on the 29th July, 1836, and adjudged that unless the defendant shall, on or before the 29th August, 1836, pay a certain sum to the complainant, or bring the same into court, that certain real estate should be sold. On the 29th September, 1836, *S. M. Hanney* appealed to the next December term, of this court. It appeared by the affidavit, that he died before the commencement of that term.

At this term, MOALE, for the appellee, moved the court to dismiss the cause. He referred to the act of 1806, ch. 90, sec. 1.

R. JOHNSON, for the appellee, cited, 1785, ch. 80, sec. 1; 1806, ch. 90, sec. 11; and 1815, ch. 149.

The court, BUCHANAN, Ch. J. and STEPHEN, DORSEY, SPENCE, and CHAMBERS, Judges, said the

APPEAL ABATED.

THOMAS S. WILSON *vs.* NEGRO ANN BARNETT.—*December*, 1837.

When it appears by the inventory returned by an executor or administrator, that he is in possession of negro property belonging to the deceased, he is properly chargeable with their hire, or the value of their services, unless he shows by proof, an adequate excuse for not having received such hire, or value.

And upon a petition for freedom, such charge is a proper item, in estimating the value of the deceased's personal estate, exclusive of the negroes; when their right to freedom depends upon the assets being sufficient to pay debts, independently of them.

To enable the jury correctly to estimate the value of their services, it is sufficient to show by evidence the annual value of negroes of the same description as those mentioned in the inventory.

When the right to freedom depends upon the sufficiency of the assets of the testator to pay debts, the inquiry is not limited to the condition of his estate at the period of his death. If the assets were sufficient at that time, but in a due course of administration, and before the executor's assent to the freedom, and without his fault, the estate, without the negroes, become inadequate, the right to freedom would not exist.

And so, if the assets are insufficient, at the testator's death, but by subsequent events, and in a due course of administration, they become sufficient, the claim to freedom could not be resisted.

APPEAL from *Baltimore* city court.

This was a *petition for freedom* filed by the appellee against the appellant, and is the same case which was here on appeal at December term, 1836, *vide*, 8 *Gill and John.* 169.

At the trial of the cause the appellee gave in evidence the will of *Elizabeth Richmond*, under which she claimed her freedom; the inventory of the goods and chattels of her estate, amounting to $4,125 52, taken the 13th June, 1832.

The defendant for the purpose of showing the insufficiency of the personal estate of the testatrix, for the payment of her debts, independent of her negroes, (which were included in the inventory aforesaid, and amounted to the sum of $1,315,) offered in evidence an office copy of his administration account, on the estate of the said *Elizabeth Richmond*, dated 9th October, 1833, in which he charged himself with

the amount of inventory, ...	$4,125 92
Sperate debts on 27th September, 1833, . .	414 51
Negro hire to 27th September, 1833, . .	192 68
Interest, ...	14 83
	$4,747 94
And obtained allowances for, . . .	1,257 80
Leaving a balance to be distributed according to the will of the deceased, ...	$3,490 14

The defendant also offered proof of a debt due by the estate of $809, to *John S. Blake, Jr.* and also of an order of

the Orphans' court of *Queen Anne's* county, dated 15th August, 1837, containing an authority for the sale of the negroes of *Mrs. Richmond's* estate, upon the ground of a deficiency of personal assets to pay debts, or such part thereof, as the administrator in his discretion, at public or private sale, may deem sufficient for that purpose.

The defendant also proved, the payment of $520 26, expenses of arresting and detaining the negroes for sale, and fees of counsel in the case of *Richmond vs. Blake*, before referred to.

The petitioner, in order to show a sufficiency of assets offered evidence, that the hire of negro men, exclusive of food and clothing, was from $50 to $60 per annum; women from $20 to $25 per annum; of girls of eleven or twelve years of age, $15 per annum, all exclusive of food and clothing. To the competency of which testimony, the defendant, (now appellant) objected, because the petitioner had offered no testimony to show, that the defendant had hired the negroes belonging to the estate of the testatrix, after the 9th October, 1833, or that he had received any profit or advantage from their labour. But the court permitted the evidence to go to the jury, and the appellant excepted. This exception was dated 13th October, 1837.

2d Exception.—The petitioner then upon the whole proof, prayed the court to direct the jury, that the administrator was answerable to the estate for the reasonable hire and profits of the slaves belonging to the estate, from the time of rendering his account to the Orphans' court in *Queen Anne's* county, in October, 1833, till they were disposed of in October, 1837, and that the jury had a right to add the amount of such hire or profits of said negroes, to the amount of the inventory as part of assets to pay debts, and by comparing the aggregate amount with the outstanding debts due by the deceased, to ascertain whether there is a deficiency of assets or not. To the granting of which direction the defendant objected, because the evidence was vague, uncertain, and irrelevant, establishes no specific sum;

and has a tendency to mislead the jury in finding sufficient assets, when the contrary is manifest. The court granted the direction, and the defendant excepted.

3d Exception.—The defendant then prayed the court to instruct the jury, that upon the evidence offered to them, the petitioner is not entitled to her freedom, and that they must find a verdict for the defendant, because it is manifest, that the personal estate of the testatrix, independent of her negroes, was not sufficient for the payment of her debts, and that it would be to the prejudice of creditors, that the petitioner should be free under the will, which opinion and instruction the court (*Brice, Ch. J. Nisbet and Worthington A. J.*) refused to give, and instructed the jury, that it is a fact alone for them to decide, whether there is, or is not, a sufficiency of assets exclusive of the negroes to pay the debts of the deceased. If from the whole of the testimony they shall find that there was sufficient assets for the above purpose, they will find for the petitioner, otherwise for the defendant. The defendant excepted.

After a motion for a new trial overruled, the verdict and judgment being for the petitioner, the defendant brought the cause by appeal to this court, where it was argued before Stephen, Archer, and Dorsey, Judges.

J. Scott, for the appellant, contended:

For the several propositions specified in the several bills of exceptions, and which show the grounds taken in the argument of the cause on his part.

D. P. Barnard, for the appellee, insisted:

1. Where an administrator acknowledges slaves to be in his possession, it is his duty to return an account of the amount of their hire, if hired out, or the value of their services if they remain in his possession, to the Orphans' court, and if he neglects to do so, it is competent for parties interested in the increase of the estate to shew by testimony, what is the reasonable value of the hire of negroes of like description.

2. That upon proof being given of the value of negro hire the jury may find, what the reasonable hire and profits of the slaves are, and add the same to the amount of the inventory in the hands of the administrator, as assets belonging to the estate for the payment of debts.

3. That where the Orphans' court, orders the administrator to sell such part of the negro property, as he may deem sufficient for the payment of the debts of the deceased, the administrator cannot proceed to sell all the negroes, unless such sale is necessary for the payment of debts; and where he makes his election from the slaves, and sells enough to pay the debt, his claim to the remainder, if there be any, ceases, and it is competent for any slave remaining unsold, in a petition for freedom under the will, to give in evidence the fact, that sales have already been made under the order of the Orphans' court, sufficient for the payment of the claims against the deceased.

4. That where evidence is given of claims against the estate, and also of matters properly chargeable as assets, the court cannot give a positive instruction to the jury to find for either party, but leave it with the jury alone to decide, whether there is a sufficiency independent of negroes to pay the debts of the deceased, and if there be a sufficiency, their verdict must be for the petitioner, if otherwise they must find for the defendant. He cited: Act of 1798, ch. 101; 1818, ch. 217, sec. 1, 2, making the hire and increase of negroes, assets. And *Hall vs. Griffith*, 2. *Har. and John.* 483. *Mann vs. State use Thomas*, 3 *Har. and John.* 237. *Evans vs. Iglehart*, 6 *Gill and John.* 191. If evidence is vague, its effect for the jury. *Whittington vs. Farmers Bank*, 5 *Har. and John.* 495. The proceedings before the Orphans' court not conclusive, 3 *Har. and John.*

Dorsey, Judge, delivered the opinion of the court.

We see nothing to disapprove of in the decision of the city court in the appellant's *first* and *second* bills of exceptions. The inventory of the personal estate of the testatrix having shewn to the jury, that the appellant was in possession at

the date thereof of sundry negroes, men, women and girls, the property of said estate, in the absence of all proof of their having been out of his possession, coupled with the presumption deducible from the order of the Orphans' court, of *Queen Anne's* county, that these negroes were still in his possession, the court very properly authorized the jury to charge the appellant, with hire or value of the services of the negroes, during the time they thus appeared to have been in his possession, and such hire was an appropriate item in estimating the personal assets of the deceased, exclusive of her negro property. If such hire was not received by her administrator, it was his duty to have shown by proof, an adequate excuse for his failure in not having done so. In fixing the hire or value of the services of the negroes in question, we can see no objection to the testimony offered by the petitioner in the appellant's first bill of exceptions. The objection to it for vagueness and uncertainty, we think by no means sufficient to destroy its admissibility.

The refusal of the appellant's prayer in the third bill of exceptions, and the instruction therein given to the jury meets our entire concurrence. The interest with which the appellant was chargeable, was a subject for the exclusive cognizance of the jury; the allowances claimed by him, and not sanctioned by the Orphans' court, were matters on which the jury were to pass, the amount to be allowed for the hire of the negroes, was a subject over which they had exclusive jurisdiction. To have withdrawn all these questions from the consideration of the jury, as the court by the appellant's prayer were called upon to do, would have been a most unwarrantable encroachment, upon the rights of that branch of our judicial system, to which is submitted the trial of all matters of fact. The ground most strongly urged against the claim of the petitioner, that her right to freedom, must depend upon the sufficiency of the personal assets of the deceased, at the moment of her death to pay all her debts, has nothing in reason or in law to support it. Had such estate at the death of the testatrix, been abundantly sufficient

to pay all her debts, but in the due course of administration, and before the assent of the administrator, to the freedom of the petitioner, and without any default on his part, the estate other than the negroes, had by subsequent events become wholly inadequate to the payment of debts, the petitioner's right to freedom would no longer have existed; and if by events subsequent to the death of the testatrix, in the due course of administration, her estate at her death, greatly insufficient, should become sufficient, the right of the petitioner to her freedom could not be resisted. To be a sound rule it must work both ways.

Had the jury in their verdict disregarded either the law or the facts of the case, the city court was the tribunal from which redress should have been sought. There such an application was preferred but was overruled. Approving of their decision we feel no inclination, even if we had the power, to arrest the execution of what we believe to have been a most righteous verdict.

Concurring with the court below, in their refusal and instructions in all the appellant's bills of exceptions, we affirm their judgment.

JUDGMENT AFFIRMED.

HENRY S. SANDERSON *vs.* RICHARD E. ALCOCK.—*Dec'r*, 1837.

An appeal will not lie by the sheriff, from an order of the county court, directing him to bring into court money which he has received upon an execution.

APPEAL from *Baltimore* county court.

The appellee in this cause obtained judgment against one *Benjamin Brady*, and on the 11th May, 1836, sued out a *fi. fa.* thereon, returnable to September term, 1836. The sheriff not returning the writ, was laid under a rule to return it, on

or before the 10th September. On the 17th October, the sheriff (the appellant) having still failed to return the writ, the plaintiff (now appellee) moved for a judgment against him, under the act of 1794, ch. 54, sec. 1.

The appellant resisted the judgment upon the following grounds:

1. Because, whether the plaintiff be entitled to the proceeds of the execution against *Brady*, is a question now depending in this court.

2. Because a motion is still pending to quash the execution in this cause.

3. Because the defendant offered, if the plaintiff would indemnify the said *Sanderson*, to pay him over the proceeds of sale.

4. Because the said *Sanderson* is sued for taking said goods, and a bill in equity is also filed against him.

The appellant then filed his petition in *Baltimore* county court, admitting the issue and levy of the execution—that the proceeds of the goods were subject to the order of the court that suits at law, and in equity had been brought against him by various parties for the same proceeds, and he prayed to be allowed his expenses and counsel fees.

At May term, 1837, the sheriff informed the court that other suits had been brought against him by *Erskine* and *Chapman* for the whole proceeds, and then moved the court for a rule on the plaintiff, to show cause why the motion for a judgment against the sheriff should not be extended until the next term, suggesting the reasons before relied on and the further one, that the property was under mortgage at the time of the levy; and produced the mortgage.

The appellee then moved the court for a judgment against the sheriff under the act of 1797, ch. 43, and filed the answer of *Sanderson* to one of the equity causes depending against him, showing the amount he had received under the *fi. fa.* against *Brady*, and it was now admitted that the mortgage on *Brady's* goods was satisfied. The proceedings in the

several causes against *Sanderson* were agreed to be received as evidence upon the plaintiff's motion for a judgment.

At October term, 1837, *Baltimore* county court (*Archer, Ch. J. Magruder and Purviance, J's*) decided, that the motion for a judgment in this case against the sheriff be overruled, and also the motion to enlarge the time for the sheriff to make return of the *fi. fa.* in this case. But it appearing to the court from the evidence in the cause, that the sheriff has made on the *fi. fa.* the sum of $8,158.95, being the net proceeds admitted by the sheriff to be due, after deducting the amount of the judgment obtained by the mortgagees of *Brady's* goods and costs, which amount is by consent of the plaintiff's counsel deducted. It is ordered by the court this 4th October, 1837, that the late sheriff forthwith on the service of this order on him, bring into court the amount thus made, and when brought in, the court will on application stay the money in court, until a bond of indemnity shall be tendered to the sheriff, to be approved of by the court, or one of the judges thereof.

From which order the said *Henry S. Sanderson*, late sheriff, appealed.

At this term the appellee moved to dismiss the appeal.

The motion was argued before Buchanan, Ch. J. Stephen, Dorsey, Chambers, and Spence, Judges.

James M. Nicholson, for the appellee, moved,

For dismissal of the appeal, on the ground that the subject of the decision below, was not of that nature from which an appeal lies.

The appellant, as sheriff of *Baltimore* county, had served and levied an execution of *fi. fa.* issued by the appellee on a judgment in his favour, but had made no return. The appellee moved for a judgment against the appellant (the sheriff) for having failed to make a return, and the appellant moved for an enlargement of the time to make his return. The court refused both motions, but ordered the appellant to

bring the proceeds of the executions into court to abide their further disposition. The appellant declined obeying this order, and took an appeal; and the question now presented is, whether an appeal lies from such a decision. In *Jessop vs. Brown*, 2 *Gill and John.* 404, a motion was made (apparently in the court of Appeals) by a sheriff for the enlargement of a rule on him to make a return to a writ of *fi. fa.* and the court there say, that there is no general rule in such cases, but that each must depend upon its own circumstances. Does not this necessarily imply, that the decision in such cases is wholly in the discretion of the court before whom the motion is made; that being the only tribunal before whom all the circumstances can fully and fairly be brought. If so, no appeal can be taken from the decision of the court below. In *Wall vs. Wall*, 2 *Har. and Gill*, 79, the court say that where the subject decided by the inferior court is left by law to their discretion, as in the refusal to grant a new trial, it has been adjudged, that a writ of error will not lie. But apart from the authority of *Jessop vs. Brown*, it stands to reason, that a motion by the sheriff for the enlargement of his time in which to make a return to a writ, is a motion to the favour and discretion of the court. The law is imperative, that he shall make a return within a specified time; and our acts of assembly direct, that judgment shall be entered up against him if he fails to do so. There is no express law authorizing him to obtain from the court an enlargement of that time. The interference of the court in his behalf is matter of practice, and not of positive law, and the practice originated from the fact that as the sheriff was the officer of the court, bound to obey its decrees, is, if at any time, peculiar hardship would be experienced by his carrying out those decrees, it was allowed as a favour for him to ask the interposition of this court, and either compel an indemnity bond to be given, or exempt him from further action. This power, the discretion of the court is appealed to. Their own officer seeks for their protection from the rigour of the law, and if in their opinion they ought to inter-

fere they are competent to do so. But if they think their interference is not necessary, there is no law enabling the sheriff to compel their interference by appeal or in any other way. In the present instance the sheriff, as was proved beyond doubt, (his own admissions,) had sold property under execution and was in possession of the proceeds. He was ruled to make a return of the writ, which he failed to do, but moved the court for an enlargement of his time, assigning for reason that the property sold was claimed by third parties who had sued him. The court thought that under all the circumstances that he was entitled to an indemnity bond, but not the possession of the money which he had been keeping for a twelve month and upwards without interest. They accordingly order him to bring the money into court to be invested, unless the plaintiff chose to indemnify the sheriff. The sheriff would not abide the decision, but by filing an appeal bond, retains possession of the money. The question is will the appeal lie? If the interference of the court below was a matter which he could demand as a right, then he can appeal from their decision. If their interference is a mere favour to be exercised by the court in their discretion according to the peculiar circumstances of each case, then their determination is final, and the sheriff must submit without delay.

R. Johnson, for the appellant.

The only question now is whether an appeal will lie from the order. It is a command to the sheriff to bring in the money, and may seriously injure him. The money is to be brought into court. But to what situation is the sheriff reduced? Here are four claimants for the same fund. None can tell who has the right. How is he to defend himself? May he not rightfully keep the funds to secure himself?

An appeal has been sustained by a defendant, ordered to bring money in by the court of Chancery? *Thompson vs. McKim, et al*, 6 *Har. and John.* 302. This order settles nothing. The appeal is taken, and money retained by the

sheriff because of its consequence to him. There is no distinction between orders at law and in equity. And the appeal is allowed, not because the order is final, but because it professes to be final, and may do great practical injustice, if erroneous.

APPEAL DISMISSED.

NEGRO PEGGY *vs.* MICHAEL WILSON.—*December*, 1837.

By the act of 1823, ch. 87, the importer of slaves into this state, from any of the United States, is not required in the list which he is to deliver to the clerk of the county, to state the manner in which he acquired his title.

If all the other requisitions of the pre-existing laws are complied with, the list is complete, though the mode of acquiring the title is omitted.

APPEAL from *Allegany* county court.

This was a petition for freedom, filed by *Negro Peggy* on the 29th day of September, 1835. The petition alleged generally that the appellant was a free woman according to the laws of the state—that she ought to be free, and was now held in service by the appellee—prayer for a judgment according to the law and evidence. The appellee denied her right to freedom, on which issue was joined.

At the trial of the cause the petitioner proved by *P. H. Bray*, that sometime in the month of May, 1824, he assisted in bringing the petitioner from *Hampstead* county, *Virginia*, to the residence of the defendant in *Maryland*, in *Allegany* county—that he often saw the petitioner afterwards at the residence of the defendant previous to the institution of this suit, the defendant claiming her as his property.

The defendant, to support the issue on his part, proved by *William Ashley*, that he was employed by the defendant in May, 1824, to go to *Virginia*, and bring the petitioner from thence to *Maryland*. That the defendant purchased the petitioner from *Warner Throckmorton*, of *Hampstead* county afore-

said, which service the witness performed; brought the petitioner to *Maryland*, and left her with the defendant as his slave. The defendant also proved his bill of sale for said petitioner, dated 26th April, 1824.

The defendant then offered to read from the records of *Allegany* county, the following list, to wit:

"A list of slaves brought into this *State* from the *State of Virginia*, to work on his farm in *Allegany county*, *Maryland*, to wit: One negro woman, *Peggy*—16 years of age.

15*th June*, 1824. MICHAEL WILSON."

To the admissibility of which evidence the petitioner objected, on the ground that said list contains no certificate of the manner by which the defendant acquired title to said petitioner, as required by the acts of assembly in such case made and provided. The county court (*A. Shriver and T. Buchanan, J's*) overruled the objection and determined that said list contained all that was required. The petitioner excepted, and the verdict and judgment being against her, she appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY, and SPENCE, Judges.

J. JOHNSON and C. F. MAYER, for the appellant, contended:

1. That the list, a copy of which was read to the jury from the records of *Allegany* county court, was not in conformity with the acts of 1796, ch. 67; 1818, ch. 201; 1823, ch. 87, and consequently was inadmissible.

2. That under the last mentioned act, it was necessary that it should appear upon the face of the list, that the negro woman (the appellant) before her introduction into this state had been a resident of some one of the *United States*, and that the list should also state the manner in which the appellee acquired title to the appellant.

R. JOHNSON and W. PRICE, for the appellee.

It is perfectly clear by the very words of the act of 1823, ch. 87, that independent of any particular mode of acquisition,

any citizen of *Maryland* has a right to import into the state a slave acquired by him in any lawful manner whatever, subject only to the obligation of recording within the period prescribed by the act of 1796, ch. 67, a list of the slave.

The only question in the case is whether, where the acquisition is neither by will nor in right of marriage, the list alluded to is to contain a statement of the importer's title? If it is, it is not because the act of 1823 in terms require it, but because it provides that the list is to be rendered *in the manner* directed by the act of 1796, for although the acts of 1804 and 1818, are also referred to, they can have no bearing upon the question, they themselves depending entirely upon the act of 1796.

The object of the provision of the act of 1796, that the list should contain a statement of the importer's title, was because the authority to import by that act was not a general one, but confined only to two cases of acquisition, and the list was therefore required to contain evidence that the party was within the act. This necessity was of course at an end, when the privilege was extended to every species of ownership, and no object was to be obtained except what the mere list would accomplish. *That* was still demanded as evidence that the provisions in the act of 1823, as to disposition here by sale, or by manumission, should not be violated. If a statement of the title is to be made, it is of course to give the true nature of the title, and when, as in this case, it is not by devise or marriage, it is not to contain a statement of either title, and if not, and the real title is to be set forth; how is it to be set forth? what is it to embrace? how much of the title is to be designated? The act of 1823 is silent upon the subject; and the very silence proves that nothing more was intended than a *mere list*, it not being to be presumed, that the legislature were ignorant, that in such a case the act of 1796, and the other acts referred to gave no rule.

Stephen, Judge, delivered the opinion of the court.

After a careful examination of the several acts of assembly referred to in the argument, and which have a bearing upon

the merits of this case, we have come to the conclusion, that there is no error in the judgment of the court below, and that the same ought to be affirmed. The act of 1796, ch. 67, sec. 1, contains a general prohibition against importing or bringing into this state of any negro, mulatto, or other slaves, for sale or to reside, and provides that if such inhibition should be violated, the slave or slaves so brought in or imported should be free. The subsequent sections of this law contain certain relaxations of the rigour of this rule, and grant permission to the owners of slaves to bring them into this state, where their titles have been acquired in a certain specified manner. The 8th section provides that if slaves are brought into this state, under the privilege thereby granted, that is, by a person owning land in an adjoining state, and the owner acquired title to such slave or slaves, by marriage, or by will; the testator's name; the date of the will; and the place where recorded, shall be inserted in the list to be delivered to the clerk of the county; and in case he derive title from marriage, the name of the person married is likewise required to be inserted in such list. The list is required to be in writing, and to contain the names, sexes and ages of the slaves, and is to be signed by the owner, his overseer, or agent, and to be delivered to the clerk of the county to be recorded within three months after the bringing in or importation of such slave or slaves into this state.

The 11th section authorizes any citizen of this state who has acquired title to a slave or slaves by marriage, bequest, in course of distribution or as guardian, to bring such slave or slaves into this state, for the purpose of working or employing such slave or slaves on his land in this state, and not for sale, provided that a list of the slaves so brought in be rendered in the manner directed in the *eighth* section. The right of sale is given to the owner after the slaves have been residents of this state for the period of three years after the importation. This section requires that a list shall be rendered in the manner directed in the *eighth* section, and as

the privilege is a limited one, a statement of the title in the list would seem to be necessary.

The privilege granted by the act of 1818, ch. 201, is nearly similar to the 11th section of the act of 1796; and varies only in that provision of it, which restricts or confines the employment of the slave when brought into this state, to the owner's own immediate service.

By the provision of the act of 1823, ch. 87, the policy of the state upon this subject seems to have undergone a very material change; for by its enactments, the door is thrown entirely open, and all restrictions as to the manner of acquiring title are removed. It provides that if any citizen of this state, hath acquired or shall acquire, property in any slave or slaves being residents of any of the *United States*, by marriage, bequest, course of distribution, or as guardian, or by gift, or any other lawful manner, such citizen may at any time remove and bring such slave or slaves, for the purpose only of working or employing such slave or slaves within this state for his own immediate service, and not for any other purpose; provided that, a list of such slave or slaves be rendered in the manner directed by the act of 1796, ch. 67, and the act of 1804, ch. 90, and the act of 1818, ch. 201, to which this act is a supplement. By the provisions of this act, it is manifest, that no regard is had to the manner in which the title originated, or how it was acquired; if it was a lawful title, the requirements of the law are satisfied. The right of removal exists, provided a list be rendered in the manner therein directed. That list we think would be complete and perfect, and if conformed to all the requisitions of the pre-existing laws in every particular, except the statement of the manner of acquiring the title. That statement we think is clearly dispensed with, by the act of 1823, upon every principle of sound and rational construction. While the title which authorized the removal of negroes into this state was special and defined, the reason for specifying the title in the list is apparent, and founded upon good and substantial reasons; but when the right became unlimited, it is

difficult to conceive a reason which would influence the legislature to require its introduction into that document. So long as the privilege was special and restricted, it might be intended not only to prevent frauds upon the law, but to furnish evidence of its violation in case its provisions should be infringed. But after the limitation was removed, and the right became a general one, the reason ceased to operate; and the requirement of the pre-existing law ceased with it. We therefore think that the opinion of the court below in that respect was correct, and the admissibility of the list as evidence not being objected to upon any other ground, we affirm their judgment.

JUDGMENT AFFIRMED.

NEGRO HARRIETT *vs.* EDWARD RIDGELY.—*December*, 1837.

Upon a petition filed by a slave, stating her right to freedom at a future time, and asking in the meantime, that the party in possession might be compelled to give security not to remove her from the state, accompanied with a suggestion that he was about to do so; it was *held* that the court had no power to interfere, and that upon demurrer or suggestion the petition would be dismissed.

Upon such a petition, the question of a petitioner's right to freedom is not presented; although the defendant in his answer tenders, and the petitioner joins issue upon that right.

An executor who has returned a slave in his inventory of the estate of his testator, is not therefore estopped from shewing, in resisting the slave's right to freedom, under the will of his testator, that he was the property of another.

Such inventory is not conclusive upon the executor, or any one else; upon proof of error, he may get credit in the Orphans' court, or when called to account, by the creditors, or distributees of his testator.

When a petition is filed for freedom, the question to be tried, is the petitioner's right thereto; and not the right of the defendant to hold him in slavery.

APPEAL from *Baltimore* city court, petition for freedom.

The petitioner alleged that by the codicil to the last will and testament of *Eleanor Dall*, deceased, bearing date the 19th day of October, 1829, duly proved and recorded, she

devised and directed as follows: "I hereby manumit, enfranchise and set free my negro woman *Maria*, and her two children, *Benjamin* and *Harriett*, the freedom of said children to take effect when they shall have respectively attained the age of twenty-one years." The petitioner further represented that *Harriett*, manumitted to be free as aforesaid, is now in jail, and claimed by *Edward Ridgely*, executor of the last will and testament of the said *Eleanor Dall*, as his slave for life. The petition then suggested that the said *Ridgely* intended to remove the said negro *Harriett* from the state of *Maryland*—prayer for a subpœna, and that he give security not to remove said girl, now about 17 years of age, entitled to freedom at the age of 21 years; and that he shew cause why he should not give security not to remove the said *Harriett* out of the state.

The answer of *Edward Ridgely* alleged that the said negro *Harriett*, never was the property or in the possession of *Mrs. Dall*, the testatrix; but at the time of her death, was the property of *J. C. Gittings;* that the said *Harriett* was born the slave of *James Sterrett*, and was never out of his possession during the life of *Mrs. Dall*, but that he had conveyed her to *J. C. Gittings*, in trust, for the wife of the said *J. Sterrett;* that it is true that after the date of the said conveyance, *J. Sterrett* mortgaged the said negro *Harriett* to *Mrs. Dall*, but this respondent submits that that mortgage conveyed no title to *Mrs. Dall;* all of which is respectfully submitted, and that the said negro *Harriett* is not a free woman, as in the said petition above is alleged, and of this he puts himself upon the country, &c.

At the trial of this cause the petitioner gave in evidence the certificate of the register of wills of *Baltimore* county, dated 1st March, 1834, under the seal of the Orphans' court of *Baltimore* county, that it had been proved by such testimony as was satisfactory to him, that the bearer, *Negro Maria*, was the identical person mentioned in *Mrs. Dall's* will.

And also proved a mortgage from *James Sterett*, dated 24th April, 1823, to *Eleanor Dall*, for the said negro with others, conditioned to pay a sum of money on or before the 1st January, 1826, which mortgage was duly acknowledged and recorded.

The defendant then proved that on the 29th February, 1820, the said *James Sterett*, in consideration of a relinquishment of dower by his wife, *Maria*, conveyed the said negro with others to a certain *James C. Gittings*, for the sole and separate use of his wife, *Maria*, which was also duly acknowledged and recorded; and that on the 24th February, 1822, the said *James Sterett* conveyed all his personal property to *Charles Sterett Ridgely* for the separate use of his wife, *Maria Sterett*, which was also duly acknowledged and recorded.

The defendant then produced *Eleanor Ridgely*, who being duly sworn, gave the following testimony: "I am the niece of *Mrs. Dall*, was frequently with her at her house in town; never knew *Harriett*, the petitioner, until the year 1830, after my aunt's death; she was never, to my knowledge, in my aunt's possession. I have always heard that *Harriett* lived with her grandmother in the country, who was *Mr. Sterett's* slave, but permitted by him to live with her son who was a free man. Shortly after my aunt's death, *Mrs. Sterett* came to town to my brother's house, and said to me that she wanted to see about *Harriett*, as she was her property. I communicated this claim to my brother very recently. *Maria*, the mother of this girl, the petitioner, lived in *Mrs. Dall's* family as her slave, and survived her mistress. *Maria*, the mother, after *Mrs. Sterett* made her claim, said she did not want her to have her child, as her mother had brought her up and found her in every thing. *Mr. Sterett* had never done any thing for them. The petitioner was brought from the country to town to be appraised in *Mrs. Dall's* estate in July, 1830." It was also agreed that *Edward Ridgely* was the executor of *Mrs. Dall*, that he had the petitioner appraised as part of her estate. That the petitioner was never in the possession of *Mrs. Dall*, but lived until *Mr. Ridgely* took

possession of her at the time of the appraisement with her grandmother, who was a slave of *Mr. Sterett's*, but lived with her son, a free man. It was also proved on the trial of this cause, that the said *Edward Ridgely* on 23d June, 1836, committed the said negro, *Harriet*, to the jail of *Baltimore* county as his slave; and that whatever interest, if any, *Mrs. Dall* had in said negro, vests in the said *Edward*, as residuary legatee under her last will and testament. It was further proved at the trial, that at the time of filing of the petition in this cause, the said *Edward Ridgely* intended to sell the said negro girl as a slave for life, out of the state of *Maryland*, and it is admitted that this intention on his part still exists.

The city court (*Brice, Ch. J. Nesbit and Worthington, J's*) thereupon adjudged the petitioner to be a slave, when she appealed to this court.

This cause was argued before Archer, Dorsey, and Spence, Judges.

Walsh, for the appellant, contended, for the reversal of the judgment on the following grounds:

1. That *Mrs. Dall* was at the time of the execution of her will, competent to confer freedom upon *Negro Harriet*, she having at the time a title to her: because there is no proof in the cause of the acceptance of the trusts by the parties in the two deeds relied upon by the defendant, and even if said trusts were accepted, the devise by *Mrs. Dall* to the defendant, connected with the fact of *Harriet* being appraised as the property of *Mrs. Dall*, and taken in possession by the defendant, operated as a foreclosure of her mortgage.

2. That the defendant having accepted the devises contained in the will is not competent to set up any title in opposition to the will; and he would have been bound in the event of the trustees making any demand, to plead limitations to protect the freedom of the negro. The proof shows that such a plea could have been maintained.

3. That the defendant by procuring the supposed title of *Mrs. Sterett* or her trustees, violated his duty as executor of said will, and omitted entirely the requisites of the act of 1817, ch. 112.

4. That the proof in the cause shews that he claims the girl as a slave for life belonging to himself, and had at the time of the filing of this petition the intention to sell her out of the state, and there is no proof of any bill of sale in compliance with the provisions of the act of 1817.

5. That the sale to *Ridgely* was so far as he is concerned, fraudulent and void, being in fact the sale of a negro for a term of years without the requisite demanded by said act of 1817. Another deed of all his personal property to *Charles Sterett Ridgely*, which is also for a valuable consideration in trust for the separate use of the said *Maria Sterett.* After the execution of both these deeds, *James Sterett* on the 20th April, 1823, by deed of mortgage, mortgaged *Negro Harriet* to *Eleanor Dall*, to secure payment of a certain sum of money on or before the 1st of January, 1826, with a clause in the mortgage deed under which the mortgagor was to retain possession of the property until default should be made, in the payment of the sum of money on the 1st January, 1826.

Eleanor Dall never at any time took possession of *Harriet*, who continued to live with her grandmother, who was a slave to *Mr. Sterett*, but lived with her son, a free man, until after the death of *Mrs. Dall.* The court therefore erred in their judgment in directing the negro to be restored to the defendant, because the judgment should have been either in favour of the claim of the petitioner to freedom, or that the said negro should be sold for the benefit of the Mayor and City Council of Baltimore.

6. The deed to *James Gittings* vested no title in him, not being acknowledged before an officer having authority to take the acknowledgment, at least the acknowledgment on its face does not state the official character of the officer before whom it was made. He was not described as judge or justice.

He cited: *Allender vs. Riston*, 2 *Gill and John.* 98. *Seimer vs. Seimer and wife*, *Ib.* 105. 1817, *ch.* 112, *sec.* 4 *and* 5. *Coale vs. Harrington*, 7 *Har. and John.* 154.

H. Evans, contended on behalf of the appellee.

1. That *Harriet* did not belong to *Mrs. Dall.*
2. That *Mrs. Dall* had no right to manumit *Harriet.*
3. That *Harriet* is not now free.
4. That under the act of assembly under which the appellant filed her petition, 1817, ch. 112, sec. 5, no appeal lies to this court; that is, that this court has no jurisdiction of this case in any shape, but all objections as to the mode of bringing the matter before them, if in any mode it can be brought up are expressly waived. He cited: 1715, *ch.* 44, *sec.* 2. 1796, *ch.* 67, *sec.* 13. *Ford vs. Philpot*, 5 *Har. and John.* 315. 1812, *ch.* 117.

Dorsey, Judge, delivered the opinion of the court.

The proceedings in this case have been most irregularly conducted, and under any modification which has been given to them, it is difficult to conceive upon what grounds a successful result to the petitioner's application could have been anticipated. The petition upon its face presents no such case as would have justified the interference of a court of justice, and either upon demurrer or suggestion to the court, it ought to have been dismissed. None of the provisions of the act of 1817, ch. 112, which have been relied on, can be invoked to the support of such a petition. Assuming the truth of all its statements, and the absence of all the other proof to be found in the record, and there is no law in this state which in such a case would warrant an interference with the rights of the slaveholder in executing the designs imputed to him by the petition.

As if foreseeing the utter inability of sustaining this petition under the act of 1817, on which it was predicated, the petitioner's counsel promptly availed themselves of an opportunity afforded by the appellee, and join issue upon the peti-

tioner's right to freedom—thus abandoning all the grounds assumed by the petition, and asserting a right wholly inconsistent with its allegations. The judgment of the court could not have been otherwise than against her, as conceding her to have been the absolute property of *Mrs. Dall*, by the instrument of her emancipation, she was a slave for three years yet to come. But supposing that obstacle to be removed, the decision of the court must have been the same. By the proof in the cause the petitioner was not the slave of *Mrs. Dall*, and therefore derived no title to freedom under her will. But it is insisted that the appellee being the executor of *Mrs. Dall*, and having returned the petitioner as her slave in the inventory of her effects, is estopped from shewing that the appellant was the slave of another. There is no such estoppel in the case. The executor is not concluded by the inventory, nor is it conclusive upon any body else—he may at any time upon proof of the error obtain a credit in his settlements with the Orphans' court for the appraisement of the petitioner, or he may obtain the same allowance when called on to account either by the creditors or distributees of his testatrix. The privilege of establishing the same fact cannot be denied him in the present proceeding.

It might be inferred from the argument in behalf of the appellant, that the court below were called on to decide upon the rights of the appellee to hold the petitioner in slavery, and not the title of the petitioner to freedom. Such is not the issue. The question is, is the petitioner free? No matter how destitute of right may be the claim of him who now seeks to detain her in bondage, if found to be the slave of any body, the judgment of the court must be against her.

JUDGMENT AFFIRMED.

Negro Anna Maria Wright *vs.* Lloyd N. Rogers. *December*, 1837.

T, the owner of the petitioner, a female slave for life, on the 18th of May, 1832, executed and delivered to her a deed of manumission, which was duly acknowledged, but not recorded. T, subsequently, not being then in possession of the slave, sold and conveyed her by bill of sale, duly acknowledged and recorded to a purchaser, having knowledge at the time of the deed of manumission. This purchaser afterwards sold her to R, to whom on the 2d of May, 1833, he executed and delivered a bill of sale, which was acknowledged and recorded according to law.

The legislature, at December session, 1834, ch. 95, passed a law, authorizing the recording of the deed of manumission; and providing that the same when recorded, should be as valid and effectual for every purpose, as if it had been duly recorded within the time required by law. After the deed had been recorded under this law, the appellant, the negro therein mentioned, filed her petition for freedom, but the judgment of the county court in opposition to her title, was affirmed on appeal to this court.

Appeal from *Baltimore* county court.

This was a petition for freedom, filed by the appellant, against the appellee, on the 14th of April, 1835, claiming her right to freedom, under a deed of manumission from *Anna Maria Tilghman*, dated the 8th of May, 1832.

After an appearance by the defendant, the case was submitted to the county court upon the following statement of facts.

"It is admitted in this case, that the petitioner was the slave for life of *Anna Maria Tilghman*, of *Talbot* county. That *Mrs. Tilghman* did execute, acknowledge and deliver to the petitioner, a deed of manumission bearing date the 18th May, 1832, that said *Anna Maria Tilghman*, did afterwards sell the said petitioner absolutely to a certain *Tench Tilghman*, which bill of sale was duly recorded in *Talbot* county court; that at the time of said sale, the said petitioner was not in the possession of *Anna Maria Tilghman*, and that the said *Tench Tilghman*, had knowledge of the said deed of manumission at the time of said sale. That afterwards, to wit: on the 2d of May, 1833, the said *Tench Tilghman*, did transfer by bill of sale of that date with a general warranty of

title, the said petitioner as a slave for life, to the defendant in the above case, for the consideration of $100; which bill of sale was duly recorded in the records of *Baltimore* county. That the aforesaid deed of manumission was not recorded in due time; that an act of assembly was passed at December session, 1834, ch. 95, to authorize the recording of certain deeds of manumission, including the deed to the appellant, by virtue of which act, the said deed of manumission from *Anna Maria Tilghman* to the said petitioner, was admitted to record by the clerk of *Talbot* county court, on the 21st March, 1835." The provision of the act being, "that when the deeds should be recorded, they should be as valid and effectual for every purpose as if the same had been duly recorded within the time required by law."

Upon this statement of facts, the county court gave judgment for the defendant, and the petitioner appealed to this court.

The cause was argued before STEPHEN, DORSEY, CHAMBERS, and SPENCE, Judges.

C. F. MAYER, for the appellant, contended:

That the act of assembly admitting the deed of manumission to record is constitutionally valid, and has the effect of perfecting the evidence of the appellant's title to freedom against the claim of the appellee, whose remedy is on the general warranty which he has taken in his bill of sale.

There can be no doubt that the act would prevail against *Mrs. Tilghman* and the first purchaser, *Tench Tilghman.*

A grantee who purchases with knowledge is bound as his grantor would have been. *Hudson vs. Warner and Vance*, 2 *Har. and Gill*, 415. *Latouche vs. Dunsany*, 1 *Schol. and Lef.* 157. This applies to *Mrs. Tilghman* and her son. Is the case different in relation to *Mr. Rogers.* It may be argued without reference to the constitutional question. Although the fact is not stated that the appellant was at large at the time of the sale to *Tench Tilghman*, yet as the

contrary is not stated, the court well presumed that she was. The manumission was immediately delivered to the woman, and she went at large. She was ostensibly free when *Tench Tilghman* purchased her, and it does not appear that possession was ever resumed. As to statements of fact these are not enlarged by inferences. But I apply that rule here to the appellee; and as it does not appear that the appellant was *not* at large when purchased, her being at liberty still continued, and it is not to be inferred that control over her had then been resumed. Connected with the facts, that only *one hundred dollars* had been paid for her, there is good reason to suppose she had a fair moral claim to freedom. This was a question only for the jury—though not urged as far as the court can notice. If true then as a conclusion of law, that the petitioner was at large, the act operated to secure her liberty. It took away from *Rogers* the character of a purchaser without notice.

When we look at the act of 1796, ch. 67, sec. 29, which authorizes the manumission of slaves, we find merely mandatory words, no provisions intended to aid a purchaser and protect him against an unrecorded deed of manumission—no clue that registration was intended for his protection, nor language that annuls the deed for want of it. It is only by argument that the act of recording in season becomes the consummation of the deed of liberation. If it be fair to refer the passage of the act of 1796 to some peculiar policy affecting our black population, it is begging the question to say that the legislature intended to vacate the unrecorded deed for its tendency to beguile purchasers. If it was the policy of the act to guard the proprietor's right, then in its construction you must take with you a residuary right in the legislature to exercise the curing power in cases of failure to record in their discretion. The judicial interpretation ought to follow this motive. The policy of the law is notified to the purchaser, and he takes under the contingency of ulterior legislation. 4 *Cruise*, 545. The master has no right to withhold the solemnity of recording after a manumission

tendered. Then the *State* is the only party interested. *McCutchen, et al, vs. Marshall*, 8 *Peter*, 220. *Ketletas vs. Fleet*, 7 *John.* 324. *Petry vs. Christy*, 19 *John.* 53. *Negro Tom*, 5 *John.* 365. *Wheeler on Slavery*, 287, cites a case in point as against a purchaser.

The vendor can convey no greater right than he possesses.

The mere circumstance of a vendor remaining in possession does not add to his rights, nor perfect his title. *Ross on Sales*, 1. *Hinde vs. Whitehouse*, 7 *East.* 571. *Mucklow vs. Mangles*, 1 *Taunt.* 318. *Langfort vs. admr'x of Tyler*, 1 *Salk.* 113. The latent legal right is enforced. *Karthaus vs. Owings*, 4 *Har. and John.* 263. Possession is not conclusive on a question of manumission. *Patty and others vs. Colin and others*, 1 *Hen. and Munf.* 519. *Allein vs. Sharp*, 7 *Gill and John.* 96.

G. L. Dulany, for the appellee.

By the statement of facts in this case, it appears that *Mrs. Anna M. Tilghman* executed a deed of manumission to her female slave, *Maria Wright*, on the 18th of May, 1832; this deed was *not* recorded within *six* months after its date as required by the act of 1796, ch. 67, sec. 29. *Mrs. Tilghman* afterwards sold *Maria* to *Tench Tilghman*, who, by bill of sale dated the 2d of May, 1833, transferred her as a slave for life to *Lloyd N. Rogers*, the defendant below, who for aught that appears, *was wholly ignorant of the deed of manumission aforesaid.*

By an act of the legislature, passed 23d of February, 1835, December session, 1834, ch. 95, sec. 1, the clerk of *Talbot* county was authorized to admit to record, "three several deeds of manumission from *Ann Maria Tilghman*, of which the above deed was one, and that when recorded, they should be as valid and effectual for every purpose as if the same had been duly recorded within the time prescribed by law."

Under this act the deed to the appellant was recorded by the clerk of *Talbot* county 21st March, 1835.

As the law before stood, it is as clear as any proposition can be made by the decision of the highest tribunal, that by the deed of manumission from *Mrs. Tilghman*, the appellant acquired no right to freedom, either of a qualified or absolute character which could be enforced in law or equity. Such an instrument conveyed no right until recorded, and if the time elapsed within which it should be placed on record, a court of chancery had no power to afford redress. The deed itself gave *not* even an inchoate right to freedom, liable to be divested, by neglecting to have it recorded within the time prescribed by law; but the act of placing the deed upon record, is itself the only, and effective origin of any right to be claimed under it. The deed not having been recorded, the appellant was at the time she was purchased by the defendant below, as much a slave, with as little right in law or equity to escape from that condition as if the deed of manumission from *Mrs. Tilghman* had never been executed. *Hicks vs. Chew*, 4 *Har. and John.* 546, is a conclusive case on this point.

The act of 1834, however, provides that the deed to the appellant may be recorded, and that when so done, it shall be as valid and effectual as if it had been enrolled within the period prescribed by law. Now, as the appellant would have been free if she had placed on record the deed which was executed in her behalf within the prescribed period, and as the act gives to the deeds recorded under it the same effect, as if they had been regularly placed on record, it follows, that the appellant, who before the passage of the act was a slave of the defendant below, by a perfect title, has by virtue of a compliance with the terms of that act, if valid, obtained her freedom, and that too, without the consent of her master or any compensation for his loss.

If then she is free, that boon has been conferred upon her by a high legislative act, when independent of that act, and notwithstanding the deed of manumission, her master and those under whom he claims, had done nothing which operated either in law or equity to bestow freedom upon her, or

in the least to impair their title to her services. The deed of manumission was wholly ineffectual, and without obligation of any kind. It gave her absolutely nothing. She was by the authority of the decision of the court of Appeals before referred to, as much the slave of her mistress, and by as perfect a title in law or equity *after* the deed had been executed, but not recorded, as before. The court will perceive then, that the immediate object and necessary effect of the law of 1834, is to take from the master his slave, to whose person and services at the time of its passage, he possessed a clear title, and that too, not indirectly by enacting some provision, creating a new rule of evidence, or regulating the remedy which might have affected his case, but by striking at and directly destroying his vested and absolute right to her person and services. For the direction in the act "that the deed may be recorded" is nugatory when standing alone; it is the additional declaration that when recorded, it shall have the same effect as if it had been recorded in time, which gives to the law its obnoxious character, of arbitrarily disturbing the private rights of property. For although it has been contended otherwise, yet I think it cannot be well questioned in this, and all other *states* where slavery exists, that a human being may be as much the subject of property as any chattel that a man may possess. And that viewed in this respect, any law which affects the rights of the master must have the same consideration, as if passed in relation to his land or personal estate.

Now if it be true that at the time the act in question was passed, that *Maria Wright* was the slave of *Rogers*, by virtue of his title acquired under *Mrs. Tilghman*, if the previous deed of manumission gave her no title to freedom in any court, and if the opposing right of her master could without question have been enforced in all, does it not follow, that the act of 1834, which professes to give validity to a void deed upon its being recorded, proves as clearly destructive to a vested right, as if it had said without reference to the deed, *Maria Wright* shall be free.

That it transcends the power of the legislature to disturb vested rights, although in so doing they might not violate the constitution of the *United States*, is a proposition as it seems to me placed beyond doubt, both upon reason and authority. Such a power is utterly inconsistent with the legitimate objects of government, one of which, and perhaps the most essential, is not to take away the property of its citizens, but to secure them in the peaceable enjoyment of it. It is often in argument assumed as an axiom, that the legislature cannot take the property of A, and bestow it upon B. It has been decided that such a proceeding would be void, even where the property taken was appropriated to public uses without compensation, as against the fundamental principles of all free government, even where there was no positive prohibition in the constitution of the state or of the *United States*, which forbade it. See *Bradshaw vs. Rogers and Mayer*, 20 *J. R.* 105, 106. *Catolen and wife vs. Bull and wife*, 3 *Dallas*, 387, 388. See also the protest of *D. Dulany*, 3 *Har. and John.* 309. 3*d Story's Constitutional Law*, 667.

The only question then that can be mooted in this case is whether the act of 1834 does destroy the vested right which *Rogers* had to the person and services of *Maria Wright*, under the laws as they existed before the passage of the act.

I assume that *Rogers'* right was a vested one, and this assumption cannot I think, be denied to me; for if a right which could be immediately and effectually enforced, (if invaded,) both in law and equity, be not a vested one, by what incidents and characteristics shall it be known and described?

If then *Rogers* had a complete vested right in the person and services of the petitioner, and the act in question while this right subsisted, declared in substance, no matter by what mode of expression, that it should cease, and that the appellant should be emancipated from the control of her master, does it not manifestly and wholly deprive him of his right, and upon the prohibition of the 21st article of the declaration

of rights, that no man ought to be deprived of his property but by the judgment of his peers, or the law of the land, as well as upon those principles already stated, ought not such an act to be pronounced absolutely void.

It is not necessary to shew that the act in question is contrary to the constitution of the *United States.* It is sufficient that it violates our own constitution, and those fundamental principles of free government which are entitled to equal, if not superior consideration.

It is admitted that every law which disturbs or destroys *vested* rights does *not* necessarily impair the obligation of contracts, and is not therefore contrary to the constitution of the *United States;* but it is equally certain, that laws which affect vested rights, may, and frequently do impair the obligations of contracts, in which case it is clear they are annulled by the constitution of the *United States.*

Is not the act of 1834 of this character? Does it not obviously invalidate the bill of sale from *Tilghman* without giving *Rogers* any remedy on the implied warranty of title which accompanies the sale of all personal chattels; in as much as when the bill of sale was given, the title was valid, and is destroyed only by a subsequent act of legislation; hence, there is no breach of the warranty, and *Rogers* would loose his property without redress? What then becomes of the obligation of his bill of sale, is it not utterly destroyed? and if so, how can the law of 1834 subsist with the constitution of the *United States.*

The bill of sale according to the law, as it existed at the time when it was executed, gave to the defendant below, an absolute property in the appellant; if she is taken from him by the interference of the legislature, and the responsibility of *Tilghman* is by the same interference superseded, such act of deprivation at once destroys his vested right, and the obligation of the contract under which he held her, and is equally inconsistent with the constitution of the *United States*, the declaration of rights, and those fundamental principles which lie at the foundation of all our governments, and impose

wholesome restraints upon the capricious exercise of mere unconfined and arbitrary authority.

There must be some things in every free government, which not even the whole people through their representatives can do; and if they should be restrained in any thing, surely it is in taking the property of the citizen, without his consent, without compensation to him, or the urgency of any public demand, for the security of property is perhaps of all the objects of governments, the most essential. Suppose an act of the legislature should pass, taking away $10,000 of the surplus wealth of A, who is worth a million, and distributing it in charity among the poor, is it possible that such a law would be enforced in a court of justice, and yet if the legislature can take away my slave and confer upon her the privilege of freedom, they do nothing more than proceed upon a principle, which if just, would authorize them to scatter the superabundance of the rich to relieve the pressing wants of the poor.

There is no safety for any man but in the controlling power of the courts, acting, not upon temporary excitements, but on fixed principles, to annul every law under whatsoever fair pretext or humane motive it may have been enacted, which takes from a citizen any thing which according to the existing laws may be the subject of property, no matter whether the law is to restore to a human being his natural right of freedom, or to the poor, their natural rights to have their urgent necessities supplied, from the superabundance of others.

One of the great errors of the argument of the counsel on the other side is the assumption that the deed of manumission was a contract with *Maria Wright*, that the neglect to record it on her part, was a mere omission of a formal requisite, and that the act of 1834 comes in aid of this technical defect, and thus substantially assists the obligation of the contract, and the intention of the parties.

The following quotation from the case of *Hicks and Chew* will shew how much the law has been mistaken on this

point: "By the laws of this state, a negro, so long as he is a slave, can have no rights adverse to those of his master; he can neither sue or be sued. Nor can he make any contract, or acquire any rights under a deed which either a court of law or of equity can enforce. And as it is the recording of a deed of manumission within the time prescribed by law, which entitles him to freedom, he continues a slave, and can acquire no rights under such an instrument, until it is so recorded, and consequently cannot go either into a court of law or equity for relief of any kind."

There was then no obligation whatever flowing from the deed of manumission by which *Mrs. Tilghman* was bound to her slave. It contained no contract; the relationship of mistress and slave existed between them, as fully, perfectly, and absolutely, after the deed as before, and if so, the deed could have no more efficacy in laying a just foundation for the law of 1834, than is presented by every instance of slavery in the state. In other words, it would be as competent to the legislature to emancipate a slave where his master had given *no* deed of manumission, as in the instance where one had been executed and delivered, but *not* recorded; for the court of Appeals have decided that such a deed gave no right whatever, and possessed no obligation, and where can be the difference of the non-existence of a deed as a matter of fact and the existence of a deed which yet is absolutely void both in law and equity? What then can be the rational distinction between a law which enacts that a slave shall be free when no deed had been given, and enacting that a purely void instrument shall be recorded, and constituting that act an effectual and valid title to freedom against the otherwise rightful claim of the master.

Would not each of these instances of legislation equally and as flagrantly violate the vested rights of property. In both the slave would be taken away without compensation, not for public purposes and without the consent of the owner, for it cannot be said that the deed itself was such an assent as removed from the law the fatal objection that it was passed without his acquiescence.

Some time after the deed had been given, and the time within which it should have been recorded had elapsed, *Maria Wright* was sold to *T. Tilghman* as a slave for life, and by him conveyed to the defendant in this cause, and whilst in his possession, and sometime after he had acquired the rights of a master, the law in question was passed, it surely cannot be said that the deed by any possible mode of considering it implied the assent of *Rogers*, or even of *Mrs. Tilghman*, to the passage of the act—and if not, what influence can the deed exert when taken in connection with the law to eradicate its essential characteristics of an unconstitutional and arbitrary exercise of authority. By the decision already referred to it was determined that the deed was no contract, imported no obligation, legal or equitable, conferred upon the petitioner no rights of which any court could take cognizance, how then is it possible that an act thus indifferent could have the curative effect of rendering a law otherwise obnoxious to strong constitutional objections, legal and proper. It cannot be even truly argued that *Mrs. Tilghman* imposed upon herself a moral obligation to liberate her slave by any other and future act. The deed was a simple gift, without consideration, operating only if it should be recorded, and the giver did nothing to deprive the object of her bounty of the benefit intended her, or to defeat the potential operation of her own instrument, that the petitioner was not completely manumitted, was the effect of her own negligence in omitting to comply with those legal requisites with which it was not in the power of *Mrs. Tilghman* to dispense, and there is nothing in the deed which expresses or implies a promise or undertaking that any future instrument would be executed, should the one she was about delivering become inoperative through the carelessness of the person most interested in it.

Should we disapprove of the conduct of *Mrs. Tilghman* in the subsequent sale of the appellant it would be yet difficult to point out what precise moral obligation was violated by that act, and if the deed carried with it neither a legal, equi-

table, or moral obligation, the mere fact of its existence as a nugatory paper, could impart no quality whatever to the law of 1834, but that act is left with the same despotic character which it would have possessed, had the deed never been executed, and must be declared absolutely void if the principle be sound that the legislature has no power to destroy the vested rights of private property. We contend then—

1. That the legislature has no power or authority under the bill of rights, or upon the fundamental principles of any just and free government, to take away the property of a citizen by law, to which, under the previous legal establishment he had a perfect title without his consent, except for public uses, and then only upon adequate compensation.

2. That the deed of manumission was so far from being a contract, having been delivered to a slave, that it was not even a gift binding upon the giver, who might the moment after have taken it back; that not, however, having been thus resumed, a mere power was granted to the petitioner to acquire the rights of freedom by placing the deed on record, that omitting to do this act within the prescribed period through her own default, this power became forever lost, and by the then existing laws, she continued as much a slave with as little title in law or equity to be freed, as if the deed had never been executed.

And, 3d, That the act of 1834, is therefore void, as its immediate object and necessary effect is to deprive the defendant of the absolute property which he held in the person and services of his slave, under the law as it existed at the time the act was passed.

It is not necessary I think to refer to the instances which have been cited by the learned counsel in his argument of retrospective laws, statutes of limitation, insolvent laws and laws abolishing imprisonment for debt, &c. as cases in point on his side of the question in this cause. For in the first place, I do not contend that the act of 1834 is void because it is merely retrospective, but because it destroys vested

rights; and in the other instances of legislation which he has enumerated, when they have been upheld by judicial decisions, they have been supported on the ground that they were not aimed at the destruction of vested rights, but were enacted to regulate the remedy of the party in the pursuit of those rights, leaving of course the rights themselves untouched.

JUDGMENT AFFIRMED.

JOSEPH G. HAYS *vs.* JOHN THOMAS MILES, *et al.*—*December*, 1837.

A fund arising from the sale of real estate, being, or about to be, brought into the court of Chancery, for distribution among the heirs and legal representatives of the party who died seized, a petition was filed in the cause, by a party claiming to be a creditor of one of the deceased heirs, who was a married woman at the time of her death, and whose husband survived her, for merchandise sold her before the marriage, (an account of which, with the usual probates, was exhibited with the petition,) praying that out of the proportion of the proceeds, his claim might be paid. It was *held*, that the petition presented a case *prima facia* entitled to relief in a court of Chancery.

It is not in all cases that a petition is the proper course to reach a fund in Chancery.

If new parties are to be made, not necessary to the original bill, and where the investigation may involve inquiries, calculated by protracting the cause, to delay parties not interested in such new inquiries, the proceeding must be by bill.

But a petition is the proper course to affect a fund in equity, when no other parties are to be brought in to litigate the questions presented by it, than such as are, or ought to have been, parties to the original bill.

APPEAL from *Chancery*.

On the 19th November, 1831, *Joseph G. Hays* filed his petition in the court of Chancery, alleging that *John Thomas Miles* and *Catharine Miles*, infants, by their next friend, have filed their bill in this court against *Eleanor Benson*, *Thomas Benson*, *James Bealle* of *James*, administrator of *John Benson*,

late of *Montgomery* county, deceased, and others, for the purpose of obtaining a decree for the sale of the real estate of which the said *John Benson* died seized, and lying in *Maryland;* that the proceeds may be distributed among his heirs at law, or their legal representatives, as will more fully appear by reference to the said original bill and proceedings, in that case had and done. That at the time of the death of the said *John Benson*, *Elizabeth Jarboe*, a daughter of the said *John Benson*, was alive, and was one of his heirs at law. That the aforesaid *John Thomas Miles* and *Catharine Miles*, are the children of the said *Elizabeth Jarboe* by a former husband, *Greenbury Miles*. That *Marietta Elizabeth Hays*, one of the respondents in the cause herein before referred to, is also a daughter of the said *Elizabeth Jarboe* by a former husband, *Hillary Hays*, deceased. That the said *Elizabeth Jarboe*, who after the death of her two former husbands, intermarried with *John Jarboe*, of *Frederick* county, in the year 1829, long after the death of her father, *John Benson*, died. That *John Jarboe*, the surviving husband, is still alive, and resides in *Frederick* county. That the said *Elizabeth Jarboe* had no children by her last husband, *John Jarboe*. That by operation of law, the said surviving husband is the administrator of the said *Elizabeth Jarboe*, deceased, she dying intestate. That the said administrator of the said *Elizabeth Jarboe*, deceased, has no assets that are liable in law or equity for the payment of her debts. That while the said *Elizabeth Jarboe* was a widow by the name of *Elizabeth Hays*, to wit: in December, 1828, she became indebted to this petitioner, in the sum of $615.09 for goods, wares, and merchandise, sold by him to the said *Elizabeth*, as more fully appears by exhibit A, which is offered as part of this petition, and died thus indebted, which debt, together with legal interest thereon, remains due and unpaid, to your petitioner. *Prayer*, that a decree may pass for the sale of the real estate of *John Benson*, deceased, as prayed in the original bill before referred to; that out of the proceeds of the sale, which shall be coming to the aforesaid *John Thomas Miles*, *Catharine Miles*, and *Mari-*

etta Elizabeth Hays, children of the said *Elizabeth Jarboe*, deceased, your petitioner be paid his aforesaid claim, together with interest and costs, for *subpœna* against the said *John Thomas Miles*, *Catharine Miles*, and *Marietta Elizabeth Hays*, and *John Jarboe*, a commission to take their answers, and such other and further relief, as equity and good conscience may require. It being expressly alleged by your petitioner, that he is remediless in the premises by the strict rules of the common law.

The exhibits referred to in said petition, and appearing in the record of this cause, were as follows:

1. An account of the property purchased by *Elizabeth Hays* at the sale of the personal property of *Hillary Hays*, $1,362.07, with probats in due form.

2. The bill filed 20th April, 1831, by *John Thomas Miles* and others, and answers thereto.

3. Decree for the sale of *John Benson's* land as incapable of division, passed 5th May, 1832.

4. Report of trustees' sales and orders of ratification in 1834.

On the 29th September, 1836, the chancellor (*Bland*) ordered the petition of *Joseph G. Hays* to be dismissed with costs, from which order he appealed to this court.

The cause was argued before STEPHEN, ARCHER, and DORSEY, Judges.

J. JOHNSON, for the appellant.

On the 5th of May, 1832, a decree passed the court of Chancery, for the sale of the real estate of *John Benson*, deceased, for the purpose of distributing the proceeds among his heirs and legal representatives.

It appears from the proceedings in the case, which led to that decree, that *Benson* died intestate in July, 1836, leaving the following children: *Eden Benson*, *Thomas Benson*, *Margaret*, married to *James Bealle*, *Ruth*, married to *William Wilcoxe*, and *Elizabeth*, married to *Greenbury Miles*.

A sale was made under the decree, and ratified by the chancellor in 1834.

It appears also, that *Elizabeth*, one of the daughters of *John Benson*, and the wife of *Greenbury Miles*, had by him two children, *John Thomas* and *Catharine Miles*, and that after the death of the said *Greenbury*, she married *Hillary Hays*, by whom she had a daughter, *Marietta Elizabeth Hays*, and that upon the death of the said *Hays*, she intermarried with *John Jarboe*, and then died, leaving the above named *John Thomas Miles*, *Catharine Miles*, and *Marietta Elizabeth Hays*, her only heirs at law, and *John Jarboe*, her surviving husband.

The bill under which the decree for the sale of the estate of the said *Benson* passed, was filed after the death of his daughter *Elizabeth*, by her two children, *John Thomas* and *Catharine Miles*, who with her other child by her second husband, *Hillary Hays*, claimed to be entitled to her proportion of the purchase money.

Whilst that bill was depending, and before the decree, to wit, on the 19th of November, 1831, the present appellant filed his petition in the case, alleging that *Elizabeth*, while the widow *Hays*, in 1828, became indebted to him in a large sum of money, and praying that a decree should be passed for the sale of the estate of *John Benson*, and that out of the proportion to which the aforesaid three children of the said *Elizabeth* would be entitled, his claims might be paid.

In this petition *subpœnas* are prayed against the three children, and *John Jarboe*, the surviving husband and administrator of the said *Elizabeth*, and for general relief.

By the chancellor's order of the 29th September, 1836, this petition was dismissed with costs, and from this order the appellant appealed, and contended:

1. That no decree having passed for the sale of the real estate of *John Benson*, in the lifetime of his daughter *Elizabeth*, her interest therein descended to her heirs at law, subject to any debts which she may have contracted *dum sola*.

Rogers vs. Krebs, 5 *Har. and John.* 31. *Leadenham vs. Nicholson*, 1 *Har. and Gill*, 267.

2. That her personal estate and choses in action, if she had any, passed to her surviving husband, *John Jarboe*, and that he is not, in respect of them, answerable to the creditors who became such before her intermarriage with him. *Act of* 1798, *ch.* 101, *sub. ch.* 5, *sec.* 8. *Forbes vs. Phipps*, 1 *Eden*, 502.

3. That for the purpose of entertaining the petition, it sufficiently appears, that her said husband had no assets, even if, in respect of them, he would be liable to her creditors—and

4th. That as the case stood, the chancellor had jurisdiction to give the appellant the relief asked for, and consequently erred in dismissing his petition.

No counsel argued for the appellees.

Archer, Judge, delivered the opinion of the court.

The petitioner alleging himself to be a creditor of *Elizabeth Jarboe*, one of the heirs at law of *John Benson*, whose estate was sought to be sold by the complainants, appears to us to have presented a *prima facie* case, for the interposition of a court of equity, and to have presented it in a competent form.

Upon the establishment of his claim, we could see no possible objection to the chancellor's assuming jurisdiction, unless he ought to have sought relief by an original bill instead of a petition. The appellant has prayed a *subpœna* against *John Jarboe*, who was not a party to the proceedings in which the petition was filed, nor does it appear that he was a necessary party, either to the bill or petition; for it is not apparent that he was entitled to be considered as a tenant by the courtesy, and if he was not, he had no interest in either controversy, and the petitioner might have dismissed the petition as to him, and proceeded against the other persons interested, for whom he sought an answer. But if he ought to have been a party to the original bill, it could not be objected, that he had made him a party to the petition, as in that case he might have had an interest in resisting the claim.

A petition may not in all cases be the proper course to reach a fund in chancery: as where new parties are to be made, not necessary to have been made to the original bill, and where the investigation may involve inquiries calculated, by protracting the cause, to delay other parties, not having an interest in such controversy. But we think it may be safely stated as a general rule, that a petition is the proper mode of affecting a fund in equity where no other parties are to be brought in to litigate the application, than such as are, or ought to have been parties to the original bill.

A decree will be signed, reversing the decree of the chancellor, dismissing the petition of the appellant, and the cause will be remanded to the chancellor for further proceedings.

DECREE REVERSED.

AIRY CROSS, CHARLES CROSS AND OTHERS *vs.* WILLIAM BLACK.—*December*, 1837.

An acknowledged exception to the rule, which prohibits a party from producing his own declarations in his favor, is, where such declarations are necessary to explain an act, which takes its *character* from the *design and intention* of the party who does it.

Declarations made by the owner of slaves, when about to remove with them from this state, and when making preparations for that purpose, are admissible evidence, upon a petition filed by such slaves against the owner for freedom, to shew the place to which the owner intended to remove; though the petitioners had offered no evidence of his declarations made at the same time and place.

As a general rule, the verdict upon a petition for freedom, being freedom *vel non*, must be for the defendant, unless a title to freedom is made out by the petitioner.

It was not the design of the act of 1831, ch. 323, to restrict, in any manner, the acknowledged rights of masters in reference to slaves residing in this state, nor to prevent their being taken or sent out of the state, to travel or sojourn, for mere temporary purposes.

A citizen of *Maryland* intending to break up his establishment, and leaving this state with his slaves, with the avowed design of becoming a resident of another state, and actually going out of the state in pursuance of such design, may, before he reaches the point of his intended destination,

change his purpose, and return with his slaves, without forfeiting his title to them; to subject him to such forfeiture, there must be an actual consummated design, to remove and place them elsewhere permanently.

APPEAL from *Anne Arundel* county court.

This was a petition for freedom filed on the 23d March, 1835, by *David Cross*, *Airy Cross*, and their children, *Charles*, *David*, *Perry*, *Mary*, *Harriet* and *James*. The petition alleged, that the appellee, while in the possession of the petitioners and residing in *Maryland*, removed with the said petitioners to the state of *Ohio*, and became a resident, with the intention of becoming a resident and citizen thereof. That while in the state of *Ohio*, the said *William* manumitted the petitioners, and they became free according to the laws of *Ohio*; that afterwards, the said *William* determining again to return to the state of *Maryland*, and become a citizen thereof, compelled your petitioners to remove with him into *Maryland*, under the false pretext, that they were still his slaves; and that the appellee still retains them as slaves, though they are entitled to their freedom. Prayer, to be adjudged free, &c. The appellee appeared, on which issue was joined, upon the right of the petitioners to their freedom.

1st EXCEPTION.—At the trial, the petitioners to maintain the issue joined on their part, offe red proof tothe jury, that the defendant claiming to be the owner of the petitioners, and holding them in slavery, went from this to the state of *Ohio*, carrying with him all of the petitioners, and after remaining there for some time, returned himself to this state, and brought with him all of the petitioners.

They then offered in evidence, declarations of the defendant to *Zimmerman*, a witness examined in this cause, made in August, 1835, about two months before his departure from this state, as aforesaid, that he intended to go to the state of *Ohio*, and that he urged the petitioner *David* to go there with him, stating to him, that he could not get his freedom in *Maryland*. That it was necessary for the petitioners to go to *Ohio* in order to be manumitted; that he, the defendant, intended to set them free there. The plaintiffs, also, offered

certain depositions, returned with a commission, which had been issued to the state of *Ohio*, taken upon interrogatories filed by both parties.

Woolsey Welles, on part of the petitioners, deposed; that he saw *William Black* at *Palmyra*, in *Ohio*, on the 21st November, 1835, with his wife and two sons and the petitioners, eight persons, very slightly tinged with *African* blood, and a light colored mulatto girl. *Black* said he was going to *Mercersburg*, *Pennsylvania*, where a brother of his resides. That Exhibits No. 1, 3, and 4, were drafted and witnessed by deponent, that he saw *Black* and his wife sign them. That Exhibit, No. 2, is in the hand writing of *John Curtis*, and signed by *David Cross* and *William Black* in the presence of the witness, after the execution of the deeds of manumission of *David* and *Airy Cross*. That Exhibits 1, 2, 3, and 4, were executed by *Black* and his wife freely and voluntarily, without any threats of personal or other injury to himself or family, or any of them, and without any circumstances calculated to produce a reasonable apprehension of personal or other injury to himself or family, or any of them. The witness further deposed, that he told said *Black*, before the execution of any of the papers, that he, the witness, had in his possession, a writ of *habeas corpus* directed to *Black*, commanding him to bring the coloured persons in his custody, and whom he claimed as slaves before the judge who issued the writ; that if that writ was served upon him, he would have to go with the slaves before the judge, and that inasmuch as the laws of *Ohio* providing for retaking and reducing again to slavery of fugitive slaves, only spoke of 'blacks and mulattoes,' the probability was, the judge would discharge from his custody, all those who have not a sufficient amount of *African* or negro blood, to come under the description of mulattoes or blacks. The witness stated he had such a writ in his possession, it was never served on *William Black*, and that the opinion he then expressed to said *William Black*, was his honest opinion. *Black* said he thought it morally wrong to hold his fellow-men in slavery, and had intended to give

freedom to his slaves, and after the execution of the deeds of manumission, he asked what was to pay for drafting them, and being answered, not any thing, he expressed his thanks for making out the papers: witness has no distinct recollection of what *Black* said in relation to his intended residence, but thinks he said, he intended to go to *Missouri*: that the justice of the peace, *James Magill*, who took *Black* and wife's acknowledgment, was an acting justice, and was so reputed, and witness has no doubt he was a lawful justice according to the laws of *Ohio*. As to his general character witness cannot speak understandingly, nothing against his character, but that he drank ardent spirits: that the witness *Daniel M. Lathrop* is a minister of the gospel of the *Presbyterian* denomination; his once having failed, so that he cannot preach the gospel, he has been engaged for a year or more, as editor of the *Ohio Atlas*. He is a man of good character, would be believed any where in the *Northern* part of *Ohio*, where he has been extensively known as an agent of the *American Home Missionary Society*. The other witness to the deed of manumission is *John Curtis*, a student of law, lives in *Brownhelm*, in *Ohio*, a member of the *Presbyterian* church, and to be relied on, where known. That witness, *Woolsey Welles*, is an attorney at law, and not aware of any law of *Ohio* in relation to negroes residing there *temporarily* with their owners: that slavery is prohibited by the constitution of *Ohio*, and knows of no law relating to manumissions.

Upon cross-examination, *Welles* deposed as follows; 'that he resided in the village of *Elyria*, *Loraine* county, *Ohio*, where he has resided since July, 1835. From that time back to June, 1834, he was travelling (as the agent of the *Ohio State Temperance Society*,) in various parts of the state of *Ohio*, principally in the *Miami* country, and on the *Western Reserve;* from that time back to May, 1826, he had resided in *Akron*, *Portage* county, *Ohio*, engaged in the practice of law, as a justice of the peace, a collector of canal tolls on the *Ohio Canal*, and as a post master, which latter

office he resigned a few months before he entered upon his agency for the *Ohio State Temperance Society*. From *May*, 1826, back to *December*, 1823, he resided in *Elyria*, aforesaid, where he practised law. From that time back to September, 1819, he resided in *Cleveland*, *Cuyahoga*, *Ohio*, engaged in the study of the law, and teaching school, and for a short time as a clerk in a store, From that time back to 1808, he resided for the most part in his father's family in *Lerveille*, *Lems* county, *New York*. From that time back to the year, 1862, he resided in his father's family in *Lanesborough*, *Berkshire* county, *Massachusetts*, where, if the family Bible record be true, he was born on the 26th May, 1802. That what led to his acquaintance with *William Black*, was information that the said *Black* was in possession of a number of persons, nearly of white colour, whom he claimed as slaves, and to whom he had promised liberty. He told his own name, and there was with me at the time I became acquainted with him, *Daniel W. Lathrop*, *John Curtis*, and a citizen of *Edinburgh*, a township adjoining *Palmyra*, by the name of *Greenbury Keen*; that *Black* stated to the witness, at the time he first saw him, that he claimed all the persons in his custody, except *David Cross*, as his slaves, to wit: *Airy* wife of *David*, *Charles*, *David Perry*, *Mary*, *James* and *Harriette*, their children, and *Maria Thornton*, a yellow girl; that he was undetermined whether he should go to *Virginia*, to *Maryland* or to *Pennsylvania*; he told us he was a cooper by trade, and that either *David Cross* the elder, or *Charles Cross*, was also of that trade; his (*William Black's*) wife and two sons were with him at the same time. This witness further proved, that the Exhibits 1, 2, 3, 4, were executed in the presence of the slaves; he cannot say they expressed a desire for them. They were evidently under constant fear of their master or mistress; their conduct and conversation was different when in, and out of their presence. The papers were executed at *Palmyra*; that within an hour or two after the execution of the papers, *William Black* and family started with their teams and the coloured

persons, from *Palmyra*, eastwardly, intending, as he then said, to go to *Mercersburgh*, in *Pennsylvania*; he heard *Black* say he intended to manumit his slaves, and that he did not believe it morally right to hold them. Witness has heard *Curtis* express opinions that slave-holding is a sin against God. That he (*Curtis*) and *Lathrop* are members of an *Anti-Slavery Society*; that no consideration was given for the manumission deeds. Witness considers slavery as a sin, and would consider it no immorality, in aiding a slave to escape from his master. Another witness proved, that *Black* had admitted *David Cross*, the father, to be free; that the mother was in part paid for; that the children would be freed by him at certain ages: and the slaves were then inquired of, whether if he, *Black*, would manumit them, they would serve him, and enter into agreement to that effect, until the time of liberation arrived? That *Black* executed the deeds voluntarily, without any apprehension or grounds of damage, either to himself or his family. Other witnesses were examined under the commission, to the same effect.

Exhibit No. 1, was a deed from *William Black* and wife, manumitting *Maria Thornton*, (the yellow girl) in consideration of her faithful services, theretofore rendered, and the good will and affection which the said *Black* had for her.

Exhibit No. 2, was a contract, setting forth that the children of *David* and *Airy Cross*, had theretofore been the slaves of *William Black*, and in consideration of manumission, the children agreed to serve him respectively, until they reached the age of twenty-five years.

Exhibit No. 3, was the manumission by *Black* and wife, of *David* and *Airy Cross*, and their six children.

Exhibit No. 4, was the contract of *Maria Thornton*, with *David Cross* as her surety, that in consideration of liberty, the said *Maria* should serve *Black* until she was twenty-five years of age.

These Exhibits were dated 21st November, 1835; and executed and acknowledged at the same time, and before the same witnesses.

The defendant then offered to prove, that the witness resided in the same house with the defendant, for more than six months next preceding the day on which the defendant left the state of *Maryland*, and that frequently, during that time, the said defendant informed the witness, whilst he was making arrangements for that purpose, that he was about to remove from this state to the state of *Missouri*; and on the day the defendant left home for the west, he told the witness, that he, the defendant, was going to settle in *Missouri;* and that some time before his departure, and while he was making his preparations, as before stated, the witness promised the defendant to make inquiries, as to what part of the state of *Missouri* one *Edward W. Dorsey* resided, which *Edward W. Dorsey* had formerly resided in *Maryland*, and was acquainted with said defendant: and the witness did make such inquiries, and did ascertain where the said *Dorsey* resided in *Maryland*, and did inform the defendant thereof; and he understood from the defendant, that he, the defendant, intended to settle in the neighbourhood of *Dorsey*. Of any declarations by the defendant, at the time, or in the places aforesaid, when and where the conversations aforesaid, offered in evidence by the defendant took place, the petitioners had offered no proof. Whereupon the petitioners, by their counsel, objected to the admissibility in evidence for the defendant, of each and every part of said declarations, conversations and inquiries. But the court overruled the said objections, and admitted the whole of said evidence to go to the jury, to prove with what intent, the defendant left *Maryland*, and to what state he intended to go. The petitioners excepted.

2d Exception.—The petitioners offered evidence to prove, that in the month of August, 1835, the defendant, in the presence of *David Cross*, one of the petitioners, told the witness that he, the defendant, was about to go to the state of *Ohio;* that he then intended to set *David* and his family, the petitioners, free; that *David* had already served out his time, and was at the time of the conversation, entitled to his free-

dom; but that according to the laws of the state of *Maryland*, he could not be free; that he intended to go to *Ohio*, because there *David* and his family might enjoy their freedom; that he intended the children of *David*, the petitioners, except *Airy*, who is *David's* wife, should serve him, the defendant, a certain time by indenture, as apprentices, before they should be free. That defendant further stated to the witness, that *David* refused to go to *Ohio* with him, the defendant,—that the witness then urged *David* to go with defendant, in order to secure the freedom of himself and family, to which *David* afterwards assented. The petitioners further to maintain the issue joined on their part, offered to prove, by another witness, that some time in the fall of 1835, the defendant left his former residence in *Anne Arundel* county in the state of *Maryland*, after having sold and disposed of his real and personal estate, with the avowed intention of removing himself and family, and the petitioners, whom he claimed as his slaves, to the west; that the defendant sold off his crops, farming utensils, and other property in this state, except such as he intended to carry away with him; and that when the defendant left the state, he took with him his wife and children, and petitioners, with the avowed intention of settling in one of the western states. That afterwards, some time in the month of December, 1835, the said defendant returned to the state of *Maryland*, with his wife and children, the petitioners also returning with him. That afterwards, some time in the month of January, 1836, the defendant told the witness, that he had been in the state of *Ohio* with his family and the petitioners aforesaid, where he had remained some time, and had there manumitted the petitioners. That *Charles*, one of the petitioners, was entitled to be free after he, *Charles*, had served the defendant for a certain term of years then specified, according to indentures of apprenticeship, executed in *Ohio*. That the defendant then offered to dispose of said term, which the said *Charles* was to serve defendant, to the witness, for a sum of money, stating he intended with the money he should receive

for *Charles'* time to purchase a slave for life. The petitioners further to support the issue on their part, offered without exception, the evidence taken under the commission before referred to, and set forth in the first bill of exceptions.

The defendant then offered proof to the jury by several witnesses, that said defendant had, at various times, from six months before, to the very day on which he left the state of *Maryland*, declared to said witnesses, that it was his intention to go to the state of *Missouri* to reside. That when advised a short time before he left the state, by one of the witnesses, to go to the state of *Ohio*, and there reside, he objected to doing so, because he could not there hold his negroes in slavery, and that he did leave *Maryland*, and on the day he departed he said he intended to go to *Missouri*, and that in the progress of his journey he went to the residence of his brother in the state of *Ohio*, where he remained about two days and a half. That he was induced to make said visit to his brother, because the latter had assured him that he would go with defendant to *Missouri;* that his said brother being unable to go with him to *Missouri*, on account of the sickness of his family, the defendant then left his brother's house, with a view to get to the *Ohio* river, and to go upon said river to *St. Louis*, in *Missouri;* that upon his way from the residence of his brother to the *Ohio* river, he was overtaken in the village of *Palmyra*, and with his wife, forced by a large collection of persons to sign instruments of writing, purporting to be deeds of manumission of all the petitioners, which said deeds were read in evidence by said petitioners. That in consequence of this forcible interposition, he determined to return to *Maryland*, and immediately bent his way in that direction; where, without stopping, except in the usual manner of travelling, he arrived in the month of December, 1835, the said negroes voluntarily returning with him; and the defendant further proved, that the petition for freedom by the plaintiffs was filed in March, 1836. He also proved that the said negroes constituted the greater and more valuable part of the defendant's property, and that the residue of said

property consisted of some six or eight hundred dollars in money, which he took with him, and a few blacksmith's tools of little value, which he left with the witness, to be sent to him at *St. Louis*, and of a few debts, or evidences of debt, which were in the hands of the witness for collection, and that on the return of the defendant to *Maryland*, he went with his family to the house of the witness, who was a distant connection of the defendant, and he, and they, have remained there to the time of filing the petitions in the cause; and that shortly after his return, the defendant advised with his friends as to the course he should pursue to assert his rights to said negroes, and that he had by advice of some or other of his friends, sent *Charles* out of the state, and there sold him as a slave for life, before the filing of the petition in the cause, and that the instruments of writing under which the petitioners claim their freedom, were in possession of *David*, the father, one of the petitioners, and that the defendant had been advised to permit said petitioners to retain said instruments, in order that the petitioners might have an opportunity of trying their right to freedom under the same; and that the said instruments were permitted to remain with said petitioners, until he delivered them to his counsel.

The petitioners, thereupon prayed the court to instruct the jury, that if the jury should be of opinion, from the evidence, that the defendant, with the avowed intention of leaving *Maryland*, and settling in the state of *Missouri*, or other of the western states, disposed of all his property, except so much as he intended to carry with him, or to be sent to him in *Missouri*, and that he abandoned his residence in *Maryland*, in the month of October, 1835, for the avowed purpose of settling in *Missouri*, or some *western* state, and carried with him the whole of his family, and the petitioners, leaving no other slaves behind him; that he went from his past residence to *Ohio*, and remained there for some time, and after being there for some weeks, determined, for the first time, to change his route, and return again to *Maryland*; that he accordingly did return in December, 1835, bringing with

him for sale, or to reside within this state, the petitioners, who are mulattoes, claimed by him, and for some time held by him as slaves, then the defendant is not entitled by the laws of this state, to hold them in bondage. Which instruction the court, (*Dorsey, Ch. J. Wilkinson, A. J.*) refused to give. The petitioners excepted.

The jury found *David Cross*, the father, to be free, and that the others are not free persons. The judgment of the court being against them, they brought the present appeal.

The cause was argued before BUCHANAN, Ch. J. STEPHEN, ARCHER, and CHAMBERS, Judges.

RANDALL and A. C. MAGRUDER, for the petitioners:

On the first exception contended, that the defendant could not offer in proof any declarations of his own, whether before or after his removal from *Maryland*, to establish his right to hold the petitioners as slaves. Those declarations being, as it is stated, no part of any conversation, of which the petitioners had offered proof.

2. In support of the second exception, they contended, that as the petitioners were carried by their then master, out of the state of *Maryland*, and kept in his service, no matter in what other state, for some time, he had no right to bring them back into *Maryland*, and having brought them back, in violation of the act of 1831, ch. 323, he is no longer allowed to hold them in bondage.

On the first exception they cited, 2 *Starke*, 253, 254. *Roscoe on Evidence*, 25. *Heane vs. Rogers and Lloyd*, 17 *Ser. and Low.* 449.

On the argument of the second exception, they cited, acts of 1783, ch. 23. 1796, ch. 67. 1802, ch. 70. 1813, ch. 56. 1812, ch. 76. 1818, ch. 201. *Boisneuf vs. Lewis*, 4 *H. and McH'y*, 414. *Hunter vs. Fulcher*, 1 *Leigh Rep.* 172. *Stewart vs. Oakes*, 5 *Har. and John.* 107. *Acts of* 1831, *ch.* 323 *sec.* 4. 1832, *ch.* 40. 1832, *ch.* 296. 1833, *ch.* 122.

1834, *ch.* 124. 1834, *ch.* 75. *Chitty, L. N.* 38. 1 *Kent Com.* 76. *Bland vs. Downing*, 9 *Gill and John.*

HAMMOND and ALEXANDER, for the appellee, insisted:

1st. That the declarations made by the appellee, at, and about the time of his departure from *Maryland*, were properly admitted as evidence of the intention or purpose of his journey. That such declarations made, when there existed no motives for concealment or untruth, furnish the best possible evidence of intention, and are especially admissible against the appellants, who claim their freedom under acts of the defendant, *subsequent* to those declarations.

2d. That the court below did right in refusing the instruction prayed for in the second exception, because there was no evidence, from which the jury could presume, that the defendant had brought the appellants into this state, either to be sold or to reside therein—and

3d. Because upon all the evidence, the jury were bound to find that the defendants had been lawfully introduced into this state.

4th. That where a citizen or inhabitant of this state, removes beyond its limits, carrying with him his negro slaves and other property, but returns before he has acquired a residence elsewhere, with a view of remaining with his negroes permanently here, the slaves are not entitled thereby to their freedom by the laws of *Maryland.*

5th. That the appellee had offered competent evidence to shew, that his journey to his proposed place of residence was abandoned, on account of violence which had been offered to himself and family, and which act of violence materially impaired the ostensible title to his slaves.

6th. That if all the facts in the prayer of the petitioners were found by the jury, it would not follow that the petitioners were free.

On the 1st Exception, they cited: *Phil. Evid.* 218. *Bateman and another vs. Bailey*, 5 *Term Rep.* 512. *Newman vs.*

Stretch, 1 *M. and M.* 338. *Vincent et al vs. Prater*, 4 *Taunt.* 603. 5 *Har. and John.* 97. 4 *Har. and John.* 243.

On the argument of the 2d Exception, they cited: 2 *Kent Com.* 430. *Murray vs. M'Carty*, 2 *Munf.* 397. *Rankin vs. Lidia*, 2 *Marsh*, 476, 477. 1 *Star. Ev.* 747. *Ros. Ev.* 21, 22. *Williams vs. East India Co.* 3 *East.* 199. *The King vs. Hawkins*, 10 *East.* 211. *Hanley vs. Pepper*, 3 *Barn. and Al.* 386. 4 *Har. and John.* 282. 11 *Pet. S. C.* 73.

Chambers, Judge, delivered the opinion of the court.

The first exception presents the question, whether the declarations of the appellee were properly admitted in evidence. We think they were. One of the acknowledged exceptions to the rule which prohibits a party from producing his own declarations in his favour, is, where such declarations are necessary in explanation of an act, which takes its *character* from the *design and intention* of the party who does it. The declarations made at a time, when occasioned by no perceptible motives of interest, like other circumstances surrounding an act, are in such instances considered as part of the *res gestæ*. Here the act was the removal of the appellee; the act of breaking up, and going from his former residence to another, which he designed to occupy. There are no facts disclosed on the record, nor have any such been suggested, which could possess the mind of the appellee at that time with the belief, that his interest was involved in declaring his removal to be with intention to settle in *Missouri*.

It is said, these declarations did not tend to affirm or deny any fact involved in the issue; but by the very language of the petition itself, the freedom of the appellants is claimed, amongst other reasons, on the ground, that the appellee removed with the petitioners to the state of *Ohio*, and became a resident, or with the intention of becoming a resident and citizen thereof.

Again, it is said, the declarations were made, or some of

them, long anterior to the period when the appellee left the state of *Maryland*; but it is expressly alleged in the exception, that all the declarations offered, were made while the appellee was making his preparations for his removal. It is further urged, that to admit this testimony, would be to contradict the rule of evidence, which denies to a party the right to contradict his declarations, when they have been made the foundation upon which an act is done, or a liability or expenditure incurred by another. We do not think in this case, the facts justify the application of that well established rule of evidence. The petitioners were the slaves of the appellee before his removal by the concession of their counsel; and if it could be shewn, that they had been influenced to do any act, or consent to its being done, in consequence of the declarations of their owner, (which however does not appear to have been the case,) we should not consider the rule as applicable to parties standing in the relation of master and slave.

The *second* exception raises the question; what is the true construction of the act of 1831, chapter 323, in reference to negro slaves, under the circumstances which exist in this case?

We cannot agree with the appellee's counsel, that there was not evidence in the cause tending to prove the facts assumed by the appellants' motion. The voluntary return of the appellee into this state with his servants, and his remaining here in the situation and under the circumstances proved at the trial, were quite sufficient to authorize the petitioners to introduce into their statement, the fact of his *return to reside*, as one, which the jury might find, and of course, would forbid the court the right to reject the prayer, as not being justified by any thing offered in evidence.

We do not deem it necessary to decide, how far the peculiar point to which the instruction was directed, *to wit*, whether under the facts assumed, the appellee "was not entitled to hold the petitioners in bondage" would have excused the court from gratifying the motion. As a general rule it is certainly true, that the issue in a petition for free-

dom, being freedom *vel non*, the verdict must be adverse to the petitioner, and consequently in favour of the defendant, unless a case of freedom is made out, and the title of the defendant in the petitioner, need not be sustained by proof, if the evidence shows that the petitioner is not free.

We prefer to meet the true question involved in the case, which is, whether a citizen of *Maryland* intending to break up his establishment, and leaving this state with the avowed design of becoming a resident of another state, and actually going out of this state, in pursuance of such design, may, before he reaches the point of his intended destination change his purpose, and return into *Maryland* with his slaves who had accompanied him, without violating the act of 1831, chapter 323. We acquiesce in the opinions expressed by the appellant's counsel, that the policy which directed the system of laws, of which this is a part, was designed, not only to avoid the introduction of slaves who had not previously been domesticated in the state, but also to forbid the return of those, who having once been domesticated in the state had ceased to be so, and had been removed to some other place.

The difficulty consists, not in ascertaining the general rule of policy, or the general rule of the law, by which the legislature has announced its purpose to pursue it, but in the application of that rule to a particular state of facts.

The law is expressed in terms the most universal; in the *first* paragraph of the *sixth* section, copying *verbatim* the language of the act of 1796, chapter 67, it shall not be lawful to import or bring into this state by land or by water, any negro, mulatto, or other slave, for sale, or to reside within this state.

The subsequent provision excepts from this general clause, the case of non resident owners, who employ their slaves on the islands in the *Potomac* river, and also the case of persons holding lands both in this state and in another state within the distance of ten miles, &c.

The act is penal in its character, and subjects the party offending against its provisions to indictment.

A literal interpretation will include this case, as doubtless the petitioners were "brought" into this state in one sense of the term; and it therefore becomes necessary to consider, whether with a due regard to the existing mischiefs to be remedied, the means of redress designed, and the actual consequences attending a literal interpretation of this act, it will effect the purposes of the legislature to construe it according to its strict letter.

The evil complained of was not the objectionable exercise of doubtful rights of property by masters, in reference to slaves permanently situated in the state. From our earliest history, masters had been accustomed to take or send their slaves out of the state for purposes obviously temporary. The legislature had secured to citizens of other states, the privilege of having their slaves here while "travelling or sojourning," and the most liberal judicial construction has been given to these provisions. *Baptiste vs. De Volunbrun*, 5 *Har. and John.* 86, and the case of *De Fontaine vs. De Fontaine*, there cited. It could not then be the design of this statute, or the older statute, from which this portion of it is copied, to deprive a citizen of *Maryland* of the privilege elsewhere, which every citizen of every other portion of the Union can enjoy in this state. Yet if the letter of the act be adhered to, it will effectually produce this result; in as much as in every such instance, where a slave has been carried out of the state by his master to travel or to sojourn, his being again "brought" into the state, if for sale or to reside, is a criminal act, involving a forfeiture of the property, and if the master can neither sell him nor require his services as a resident servant, he is useless and expensive.

Against such a construction we may well oppose the universal opinion and practice, during the whole period embraced by this system of legislation, commencing in 1783. We know that our citizens have constantly taken their slaves with them, when visiting other states, and have returned

with them into *Maryland*, have sent them out of the state for a mere temporary purpose, without the presence of their masters, and have had them to return again, and no doubt has been expressed, as to the power to do so without hazard to their title in such slaves.

The act of 1831 did not restrict in any manner the acknowledged rights of the master, in reference to slaves located in the state; nor did it design to embarrass him with conditions, which according to the familiar habits of our citizens, would refuse him the services of his slave in duties of every-day's occurrence; consistently with such a literal application of this language, it would be impossible for our citizens to travel by the regularly established mail roads, from one portion of the state to another, without violating the law, and forfeiting his property, if he should insist on having his slaves to minister in their accustomed offices to himself and his family, because, as is in some instances the fact, such a journey would be in part over the territory of another state, and yet the same indulgence is expressly secured to the master with slaves from any other state.

The necessity for such exceptions to the strict letter of the provision is manifest. The counsel admit it. The principle of the exception, we think, governs the case before us.

There must be a termination in the relative duties of protection and obedience, which had existed between the state and the resident slave—not a design or purpose only to terminate these relations, but an actual consummation of such purpose by the active agency, or positive assent of the owner; a purpose to remove them out of the state permanently, and place them elsewhere, and this being consummated, the master then assumes the attitude of the owner of non-resident slaves. The case of *Bland and Beverly*, 9 *Gill and John.* has been referred to, as establishing a doctrine differing from that we have declared. We think it quite in accordance with all we have said. That case went upon the ground that the owner of the slave assented to his leaving the state for a permanent purpose, and thereby placed the

slave in the attitude of a non-resident, the assent to his leaving the state being equivalent to his being carried out by his owner, and consummating the design of a permanent removal. The case made by the petitioners in this second exception, does not consummate the purpose of a permanent abandonment of the state. The numerous mischiefs suggested in argument would inevitably result, if the master could be considered as having lost his claim, to be considered a citizen of *Maryland* before he had become a resident of another place, placing him at the mercy of all who might officiously or malevolently oppose his just claims to the quiet enjoyment of his property, and denying him the character of a citizen of any one of the states, in which character alone, he could invoke the aid of the laws, and legal tribunals of that government, which is common to all the states.

The itinerant and unsettled condition of the master will give character to the condition of his slaves. They are to be considered as attached to his person; dependent on his movements; and their will is merged in his. Their return with him, therefore, under the circumstances we have been considering, must be regarded, like his, as the termination of a temporary absence, which will not constitute an importation within the meaning of the acts of assembly.

These views lead us to concur with the opinion expressed in the second exception.

JUDGMENT AFFIRMED.

ANN W. WOOD *vs.* THOMAS BRUCE.—*December Term*, 1837.

If a party having applied to a Court of Equity for an injunction, be frustrated, afterwards apply to another court of concurrent jurisdiction, upon the same grounds, without disclosing the first application, the party aggrieved may apply in a summary way for relief, and the court in which the second cause is depending, will at once extend it to time.

But where the second application is not upon the same identical grounds as the first, the injunction granted upon the former, should not be dissolved without answer, or at all events, without notice to the complainant.

And the circumstance that a long period had elapsed from the time the second bill was filed, before any proceeding was adopted by the defendant, is an additional reason why an answer should be required.

Appeal from *Chancery*, from an order dissolving an injunction.

On the 28th September, 1824, *Ann W. Wood* filed her bill on the equity side of *Charles* county court, alleging, that in the year 1818, she purchased of a certain *William Strickland*, a negro woman on credit, for the sum of $500, for which she executed her bill obligatory to him; that said negro belonged to a certain *John Peirce*, who devised her to be free at the age of twenty-one years; that said negro was upwards of twenty-one years of age when she purchased her, at which time she had never seen the will of *Peirce;* that *Strickland* assigned his bond to *T. Bruce*, who sued the complainant to judgment; that a *fi. fa.* has been issued thereon and levied. That the negro has recently filed a petition for freedom in *Charles* county court; that the complainant has been summoned to answer that petition, and the protection of the court granted to said negro. That *Strickland* gave a bill of sale for the negro to complainant, and that he was fully cognizant of the will in favour of the negro, and that *Bruce*, the assignee, was also perfectly aware of her claim to freedom. The short copy of the judgment, will, protection of the court, and bill of sale, were filed with the bill: this prayed a *subpœna* against *Strickland* and *Bruce*, for an injunction and general relief.

On this bill an injunction issued, at August term, 1837.

On the suggestion and application of *Thomas Bruce*, the cause was removed to the court of Chancery, where, on the 11th September, 1837, he filed his petition, suggesting, that on the 12th January, 1824, *Ann W. Wood* filed her *bill in Chancery* against the said *Bruce* and *William Strickland*, since deceased, to obtain an injunction to stay the execution of the judgment at law, mentioned in the bill in this cause; that the injunction was issued, and subsequently dissolved, to wit, at July term, 1824, and afterwards, that said bill was dismissed. The petitioner alleged, that after the bill was dismissed, to

wit: on the 28th September, 1824, the said *Ann W. Wood* filed her bill on the equity side of *Charles* county court, and obtained an injunction upon the identical same grounds, and equities, which she had alleged in her aforesaid bill, without disclosing to the judges of *Charles* county court, the fact of the previous proceedings in this court, and that this proceeding of the said *Ann Wood* is not only embarrassing and vexatious to him, but is a gross abuse of the process and authority of this court, and deserves its animadversion; and the said petitioner further alleged, that he has caused the papers and proceedings in the last mentioned case to be transferred from *Charles* county court to this court, in order that the court, by a comparison of the bills filed in the two cases, may see, that they are both founded on the same equity, and are in substance the same cause, between the same parties, and seek the same relief—that all the money is yet due on the judgment, and he therefore prays that your honour will at once, and without further proceeding or delay, cause the aforesaid injunction to be dissolved and the bill dismissed.

With this petition there were filed the proceedings in the *first* cause, the nature and character of which, are sufficiently adverted to in the opinion of *this* court, to supersede the necessity of a further statement of them.

On the 11th September, 1837, the chancellor on inspection of the petition, and the two records, ordered that the injunction granted on the bill filed in *Charles* county court, be annulled and dissolved, as prayed for—and from this order the said *Ann W. Wood* having obtained an *allocatur*, from his honour Judge *Stephen*, brought the present appeal.

The cause was argued before Archer, Dorsey, and Spence, Judges.

By Alexander, for the appellant:

Who insisted that the equities of the two bills were not the same, and that the dissolution was too summary, he cited: *Johnson vs. Stagg*, 2 *John. Rep.* 519. *Wicks, et al vs. Chew*,

et al, 4 *Har. and John.* 543. *Brown vs. Wallace*, 4 *Gill and John.* 495.

J. Johnson, in reply, contended:

That the two bills were substantially alike, and that the power of the court was properly exercised. *Bampus vs. Platner, et al*, 1 *John. C. R.* 213. *Brown vs. Wallace*, 4 *Gill and John.* 494, 495. *Reynolds vs. Pitt*, 19 *Ves.* 134.

Archer, Judge, delivered the opinion of the court.

The petition of *Bruce* to the chancellor for his summary interposition in dissolving the injunction obtained by the complainant in September, 1824, in *Charles* county court, is founded on the allegation, that the complainant's equities, as presented by his bill, were identical with those alleged in a bill by the same complainant against the same defendant, on which an injunction was obtained on the January preceding, in the Chancery court, and which had been dissolved in that court, in the month of July, 1824; and that the second injunction was obtained without disclosing to the *Charles* county court, the proceedings had in the Chancery court.

Cases undoubtedly, may often occur, where parties availing themselves of the concurrent power of the county courts in equity proceedings, may for purposes of vexation and delay, being frustrated in the one tribunal, resort to the powers of the other; and by failing to disclose such proceedings as may have been had, obtain by gross abuse of the process and powers of the court, relief in the preventing and restraining power of the court. And when such a case occurs, it is a salutary practice, to apply in a summary manner the powers of the court, to relieve the parties from such vexatious proceeding; and to disabuse the court, in being for an instant, the instrument of oppression. And the question submitted is, whether the case before us be one of that description.

The bill of January, 1824, rested solely upon the allegation, that the negro claimed her freedom, not pretending that

she had been deprived of her property or in any manner disturbed in the enjoyment of it, and sought an inquiry into the consideration of the note, and a perpetual injunction.

The bill of September, 1824, alleges a sale of the negro with knowledge of her claim to freedom; and avers knowledge of such claim also in the assignee of the single bill; avers the pendency of a petition for freedom by the negro, and prays a temporary injunction until the right to freedom shall be determined on the petition, which had been filed in September, 1824.

Whether the second bill presents indisputably and clearly a case for the equitable interposition of a court of equity, it is not perhaps necessary to inquire; the question to be decided, being, whether the case made by the first, and by the second bills, are identical. Between the dismissal of the first bill, and the institution of the second, a litigation had commenced in a court of common law, which in its event might deprive the complainant of the negro. This, together with the averment of knowledge on the part of the seller and the assignee of these claims, furnish the groundwork of the second bill. For any thing which appeared in the first bill, the complainant might never have been in any manner disturbed in the possession of the negro. They were claims set up, but not sought to be enforced, and might never be attempted to be enforced in the proper tribunals.

In this view of the case it strikes us, that the equities of the two bills are different, and that the injunction should not have been dissolved without answer, or at all events, without notice to the complainants.

The fact too, that this bill has been suffered to remain for a period of thirteen years without answer, all the while the injunction remaining in full force, while from the course of practice in the common law courts, the petition for freedom must have long since been decided, are circumstances which we think ought to induce a court of equity to require an answer from the defendant, and listen with no favourable ear to an application for the intervention of its summary powers,

when, if it were true, that the petitioner had been adjudged to be a slave, an answer of that fact would have at once procured a dissolution of the injunction; while, if on the other hand, the petitioner had been some ten or twelve years since adjudged to be free, the causes for the absence of an answer would be easily furnished, and the application, now on appeal before us, satisfactorily accounted for. The order of the chancellor dissolving the injunction in this case, will be reversed with costs, and the cause be remanded to the Chancery court for further proceedings.

ORDER REVERSED.

William Powell, *et al vs.* Josiah Bradlee & Co. *December*, 1837.

The principle is unquestionable, that property in the custody of the law, cannot be *replevied;* but where property had been first *replevied,* and there was evidence to show that the plaintiffs in that suit, had waived the delivery of the possession to them under their writ, and it was then taken under a subsequent writ, the court will not instruct the jury, that the plaintiff cannot recover, if they find that such subsequent writ issued while the property was in the custody of the sheriff.

Whether two defendants can be sued jointly in *replevin,* for several parcels of property, severally owned, and separately taken and detained? *Quere.*

But the defect of such misjoinder, (if it be one,) may be cured, by putting the party to his election; or by the verdict of the jury, finding for the plaintiff on one count, and for the defendant on the other.

The court will not instruct the jury, that a sale for cash, payable on delivery, passes no title in the property sold to the vendee, if the cash is neither paid or tendered, where there is evidence of an usage to deliver the property without demanding the cash at the time.

It does not follow that a sale is fraudulent and void, because the vendees at the time of the purchase are insolvent, and know themselves to be so, and did not communicate that circumstance to the vendors, who were ignorant thereof, and known to be ignorant by the vendees.

The party to whom, by the terms of the bill of lading, the property is to be delivered, has the legal title, and is competent to maintain *replevin* therefor.

If a sale of goods be made for cash, the vendors may, by an unconditional delivery, without a concurrent demand of the money, waive the cash payment; and such delivery unaffected by fraud on the part of the vendees,

would pass the property. But if a sale be made for cash, the purchaser will acquire no title without payment, unless that condition be waived by the vendor.

Where goods are sold upon terms of being paid for on delivery, and there is evidence of an usage in such cases, of delivering, without demanding the cash at the time; and the goods so sold are actually delivered without being paid for; it is proper that the court should leave it to the jury to say, whether the delivery was in reference to the usage, and no waiver of the cash payment; or without reference thereto, and unconditional, so as to pass the title.

If parties purchase goods knowing themselves to be insolvent, and without any expectation of paying for them, and in circumstances which preclude the vendor, by ordinary prudence, from becoming acquainted with the facts, which are concealed from him by the purchaser, who shortly afterwards fails, and applies for the benefit of the insolvent laws, the contract of sale is fraudulent and void, and passes no title.

But if under such a sale, the goods are delivered to the purchaser, and he transfers them by bill of lading to a third party, who *bona fide*, and upon the faith of such tranfer becomes his creditor, the title does pass to such third party.

In order to invalidate a sale upon the ground of fraud, it is not necessary that the jury should find, that the purchaser knew he would be unable to pay. It is sufficient, in that respect, that he should be found by the jury to be in insolvent circumstances, and had no reasonable expectation of paying for the goods purchased.

An instruction, founded upon the hypothesis, that the jury may find that certain facts did not exist, of which there was no evidence, is erroneous, as tending to mislead them in forming their verdict.

If *one* of the plaintiffs in a previous *replevin*, agrees to dispense with the actual delivery of the property taken under it, and to consider it delivered, so that the plaintiff in a subsequent *replevin* may take it as if the delivery under the first writ had been consummated, it is not competent for the plaintiffs in such first writ, to object that the property when taken under the second, was in *custodia legis*.

But the objection that the property is in *custodia legis* may be made, unless there is an agreement, dispensing with the delivery prior to the execution of the second writ, although the defendants subsequently to its execution, may agree to waive the irregularity, and to ratify and confirm the proceedings of the sheriff.

APPEAL from *Baltimore* county court.

This was an action of *Replevin* sued out on the 26th April, 1833, by the appellees trading under the firm of *Josiah Bradlee & Co.* for 510 barrels of flour, and 4424½ bushels of corn, the property of the plaintiffs taken and detained, &c. by *William Powell*, *Henry B. Fiddeman*, *John Boggs*, and

Alexander L. Boggs, the defendants. The property was returned by the sheriff replevied, and delivered as per schedule, which bore date on the 29th April, 1833, and the receipt of *Andrew Hall* of that date for both, was filed by the sheriff—the defendants severed in their pleadings. *Powell* and *Fiddeman* pleaded *non cepit*, and property in themselves in all the goods, and *J. and A. L. Boggs* also pleaded *non cepit* and property in themselves and all the goods taken, &c. The plaintiffs joined issue on the first, and replied, property in themselves in bar of the second plea, on which, issue also was joined.

At the trial the plaintiffs offered in evidence a bill of lading, for the corn and flour, bearing date 24th April, 1833, shipped by *Tyson & Norris*, of *Baltimore*, on board the brig *Joseph*, *Frisbee*, master, bound to *Boston*, consigned to the appellees, endorsed as follows: "*Boston*, 12*th May*, 1833. Accepted to deliver the within named corn and flour to Messrs. *Josiah Bradlee & Co.* the consignees. *James Frisbee.*" And also the following letters from *Tyson & Norris* to the plaintiffs, dated 18th, 19th, 23d, and 24th April, 1833, marked B, C, D, and E, and the following letter from the plaintiffs to *Tyson & Norris*, dated 20th April, 1833, marked F.

(B.)

Josiah Bradlee & Co. Boston. *Baltimore, 4th mo. 18th,* 1833.

Annexed you have bill lading for 3613½ bushels splendid yellow corn on board the brig *Patapsco*. The *Patapsco* did not take the quantity agreed, on account of other freight received, and wet weather prevented completing cargo as soon as expected. This is truly a handsome lot, and well selected, about 1000 bushels in bottom of cargo very heavy and sound—2096 bushels choice sample, can be had in after-hatchway; the balance similar to that on top-forward-hatch we requested insurance in former letter. If you cannot get 85 cents for this cargo on board, put it into store; think you will find it equal to the northern corn, remarkable for its cleanness, and heavy; it may be best to sell in lots of 500 bushels—72 cents offered and refused for the fellow-cargo to the 2096 bushels on board *Patapsco* to arrive, 75 asked.

Enclosed you have bill lading for cargo corn, 2683 bushels on board the schooner *Howard*, all white and yellow mixed, except about 650 bushels good yellow. If you cannot get at least 80 cents, wish it put into store; requested insurance in a former letter—are about to load the brig *Joseph* with a cargo of corn to your address. Please keep us advised of markets. We draw on you to-day at 30 days for *N. Tyson*, for $2,000, which please honour.

Yours respectfully, TYSON & NORRIS.

N. B.—Since writing the above we have your esteemed favour of the 15th inst. before us, and contents particularly noted. Should you be under the least apprehension of the corn we have sent you, not keeping, wish you to effect sales of such, of which we submit entirely to your better judgment. We have some in store for several weeks, and thus far keeps well—and exercise your judgments also in sales of the two cargoes here sent—will examine into accounts and take due care that the shipment now making will fully cover amount of your drafts as mentioned.

Respectfully, yours, T. & N.

(C.)

Josiah Bradlee & Co. Boston. *Baltimore, 4th mo. 19th,* 1833.

RESPECTED FRIENDS:

We advised you in ours of yesterday of having taken up brig *Joseph* to load for your address. A vessel offering after writing to you yesterday, which we liked better, and the captain of the *Joseph* preferring a freight offered him to *Portland*, we took the schooner *Sarah and Priscilla*, *Chesapeake* built, a good vessel of 900 bbls. burthen, and will have her despatched without delay—please get insurance effected on receipt of this, on flour, to amount of $3,000, and on corn to amount of $2,200. Insurance on corn at the lowest rate of average. We have examined our accounts since receipt of yours of 15th, at hand yesterday afternoon, and find we have drawn much closer than we had any idea of—you shall be amply covered without delay. We have no fear of the corn we have sent you respecting its keeping, as we have been

exceedingly careful—corn brought to market in February and 1st March, was damp—since, it is more generally in good condition; however, leave you free to act with any we have sent, as in your better judgments, our interest may be promoted; will, however, repeat our full reliance on very high prices for the article next month, and high in June; our idea was to sell next month, should you have any doubts of its keeping, sell such parts at least, without delay. Fresh flour will be high also in May and June, from the unusual scarcity of wheat, and we look for better price; it may be dull for a while; sales from the wharf may be best, of which, leave you free to act. Should suitable prices be offered—corn is scarce—we have bought as low as 65 *a* 66 cents first of this week, and put into store, no vessels being here to load; and a good supply caused a slight re-action; it is again scarce, and sales, white at 69 cents, yellow, 71 cents; considerable bought for the *Madeira* market.

Your esteemed friends, TYSON & NORRIS.

N. B.—Since writing the above, yours of the 16th at hand, and regret that you should have had cause to complain; shall of course take better care in future."

(D.)

"*J. Bradlee & Co. Boston.* *Baltimore, 4th mo. 23d,* 1833.

RESPECTED FRIENDS:

Yours of the 20th at hand, and regret to learn of your having refused acceptance to our draft of the 15th. We shall proceed without delay, as advised in our two last, to make shipments sufficient to satisfy you fully, and hope you will then protect the drafts drawn. The *Sarah and Priscilla* is unavoidably delayed at the ship yard, undergoing some repair to her cabin. Shall despatch her with all possible speed. The flour has been in waiting to go on board for several days—no other vessel to be had to load sooner. We wish you to exercise a wholesome discretion in effecting sales of our corn and flour.

Your esteemed friends, TYSON & NORRIS."

(E.)

"*Josiah Bradlee & Co. Boston.* *Baltimore, 4th mo. 24th,* 1833.

RESPECTED FRIENDS:

We wrote you yesterday, since which we find the *Sarah and Priscilla* will not get from the ship yard for two or three days, and having completed the loading of the brig *Joseph,* originally destined to *Portland,* concluded to send her to you—bill lading you have herewith annexed for 205 bbls. Howard street super, marked C and H, and 100 bbls. super marked S, and 100 bbls. fine flour, *Susquehanna,* marked F. This is a handsome parcel of flour: also 101 bbls. of best first middling, marked M; also, 2760 bushels heavy yellow corn, and 1664½ bushels white—the yellow can nearly all be got out separate, the white being on bottom of forward hold. This will be found a very superior cargo corn, in handsome condition. Please get insurance effected on flour to amount of $2,700, and on corn to amount of $3,100. We hope you will now have no hesitation in protecting our drafts. We regret you did not await our reply to your first intimation, that we had drawn too close. Exercise your better judgment in the disposition of our flour and corn. Flour is in better request to-day, and several sales of *Susquehanna* at 5.31¼, for export, *City Mills* 5½, and corn retains its price.

Your esteemed friend, TYSON & NORRIS."

(F.)

"*Messrs. Tyson & Norris, Baltimore.* *Boston, April* 20, 1833.

GENTLEMEN:

Your favour of the 15th inst. is before us, advising that you were loading the schooner *Howard* with corn, and had drawn another draft at 45 days for $2,500, which we have permitted to be noted for non-acceptance, and regret being obliged to do so; but we find it necessary to come to a stand. You have already drawn for nearly or quite the value of the property shipped, which is mostly corn, an article that may injure by keeping, particularly at this season, as it is said to be not well dried. We feel that there will be considerable risk in holding corn, and are of the opinion, that we

ought to proceed in the sales unless you will refund one-quarter of the amount advanced.

Respectfully, your friend, JOSIAH BRADLEE & Co.

P. S.—Since closing the within, the schooner *Darius* has arrived—the corn is heated, and we shall have to sell it on board."

The plaintiffs then proved that the goods mentioned in said bill of lading, were shipped by *Tyson & Norris* on board the brig *Joseph*, in the port of *Baltimore*, on or before the 24th of April, 1833.

The plaintiffs further offered in evidence, a writ of *replevin* issued at suit of the defendants, *A. & J. Boggs*, and also a writ of replevin issued at suit of the defendants, *Powell and Fiddeman*, out of *Baltimore* county court, which were admitted to have been issued, the first on the 25th, and the other on the 26th April, 1833, and for the recovery of part of the flour and corn respectively, which had been so shipped by said *Tyson & Norris*.

The plaintiffs then proved by —— *Wilson*, that on the 25th of April, 1833, the said writ of *replevin* of the said *A. and J. Boggs*, was placed in the hands of him, the witness, as the deputy of the sheriff of *Baltimore* county, and that in order to the execution of said writ, he, the witness, went down on the evening of that day to the brig *Joseph*, and that not finding the captain there, he went to the shore, met with the captain, and went with him to the office of an agent of the plaintiffs, when it was agreed that the vessel should remain until 12 o'clock the next day, to see whether any amicable arrangement of said action could be effected; that on the next morning, no arrangement having been made, the said writ of *replevin* at the suit of *Powell and Fiddeman* was issued, and put into his hands, as deputy as aforesaid, and that having discovered that the said vessel had got under weigh before the time agreed upon; the witness having said writ of *replevin* in his possession, and with a view to the execution of the same, employed a vessel to pursue the *brig*, and bring back the property to which said *replevins* respec-

tively related. That said witness accordingly went in said vessel with said *replevins*, and in company with *J. Boggs*, and the agent of *Powell and Fiddeman*, in pursuit of the said brig, and overtook her, and that being about to execute said *replevins*, the captain of the said brig *Joseph* proposed to come back to *Baltimore*, to enable the witness to execute said writs there, to which the witness assented. That accordingly said brig returned, and the witness, after she came to the wharf, in the execution of said writs, began to unload the flour and corn, to which they related. That on the morning of the 27th of April, and whilst the witness in the execution of his duty under said writs, as deputy sheriff, was engaged in so unloading said flour and corn, *Mr. Murray*, another deputy of the said sheriff, came down to the wharf when he was so engaged, with the writ of *replevin* issued in this action, which is admitted to have been issued, for the recovery of the whole of said property, so replevied under the said writs of *A. & J. Boggs* and *Powell and Fiddeman*. That witness then proceeded no further in the execution of said last mentioned writs, but had then unloaded about two hundred barrels of the flour, and about one thousand bushels of the corn. That immediately afterwards, the said *Murray* executed the said writ of replevin in this action. The said witness further proved, that the said flour and corn, so taken by him under the said several *replevins* of the defendants, *A. & J. Boggs*, and of *Powell and Fiddeman*, were never in fact delivered to them, the said defendants, nor ever appraised by him before the writ in this case was served; and that he had no knowledge of any agreement on the part of the defendants, or any of them, before the said property was replevied under the writ in this action, dispensing with the delivery to them of the corn and flour respectively, under those said writs of *replevin*, or agreeing to acknowledge delivery. The plaintiff then offered in evidence the following schedules and receipts of *A. & J. Boggs*, and of *Powell and Fiddeman*. "*A schedule* of the goods and chattels of *William Tyson* and *Lloyd Norris*, seized and taken at the suit of *John Boggs*

and *Alexander Boggs*, by virtue of a writ of *replevin*, issued out of *Baltimore* county court to the sheriff thereof, described and appraised by us the subscribers, who first being duly summoned and sworn for that purpose. Given under our hands and seals this 29th day of April, 1833.

296 barrels of flour marked F and S, at $5 19, $1,536 24

E. Dorsey, [seal.] *Alex. Cummins*, [seal.] *Jacob Myers, Jr.* [seal.]

April 29th, 1833, received from the sheriff of *Baltimore* county, the above appraised flour. Jno. Boggs & Co."

"A schedule of the goods and chattels of *Frisbee*, seized and taken at the suit of *William Powell* and *Henry B. Fiddeman*, by virtue of a writ of *replevin*, issued out of *Baltimore* county court, to the sheriff thereof directed, and appraised by us, the subscribers, who first being duly summoned and sworn for that purpose. Given under our hands and seals this the 29th day of April, 1833:

2,036 bushels of corn at 65c. . . . $1,323 40

E. Dorsey, [seal.] *Alex. Cummins*, [seal.] *Jacob Myers, Jr.*, [seal.]

April 29th, 1833. Received of the sheriff of *Baltimore* county the above appraised corn.

Powell & Fiddeman."

Which were admitted to have been executed by the said defendants respectively, or their authorized agents, and for the property to which these said *replevins* related: And also proved, by the said witness, that the body of said receipts was in his, witnesses hand writing. The said witness also proved that, when he first found the *brig Joseph* in the evening, she was lying abreast of the powder house, about one hundred yards from the shore, in the stream, and about half a mile from *Spears'* wharf, and that the captain had gone ashore for wood. That he understood from Mr. *Murray* at the time, that there was some agreement with *J. Boggs*, about the delivery of the flour under *Boggs' replevin* before the *replevin* in this action was served, but has no personal knowledge of any such agreement.

The plaintiffs further proved, by *Matthew Murray*, that the writ of *replevin* in this action, was placed in his hands as deputy sheriff for execution, on the morning of the 27th of *April*, 1833, and that he went with Mr. *Hall* the agent of the plaintiffs to the wharf, where the witness *Wilson* was engaged in unloading the corn and flour under the defendants' said several writs of *replevin*. That a considerable portion of the corn and flour was then unloaded, and that *J. Boggs*, one of the defendants, was then there; that it was then and there agreed between the witness and said *J. Boggs*, that *Wilson* might cease delivering the flour, and that he, *Boggs*, would consider it delivered, and receipt for its delivery; and that immediately after said agreement, and not before, he the witness, executed the plaintiff's *replevin* in this action; that he made no agreement except with *Boggs*, and that the corn and flour never were in fact delivered under the said previous writs of *replevin*, and that it was his the witnesses impression, that at the time of said agreement, he drew a receipt for the flour to be signed by *Boggs*, which *Boggs* then signed on board the vessel. The witness being then directed to the receipt of *Boggs* for the said flour, offered in evidence in this cause, then proved, that that was the receipt to which he alluded, and that it was not in his hand writing, but in the hand writing of the witness *Wilson*, and that he was not positive as to the time or place at which said receipt was given, but that the said agreement between him and *J. Boggs*, was in fact made before the plaintiff's *replevin* was served.

The defendants to support the issue on their part joined, then proved by *Edes* that he was the clerk of the defendants *A. & J. Boggs* during the month of *April*, 1833; that on the 22d of said month, the said defendants sold for cash, to *Tyson & Norris*, 296 barrels of flour, of which it was admitted that, the two hundred barrels *replevied* by the plaintiffs in this action was a part; that before this sale, the said *Tyson & Norris* had several times applied to the said *A. & J. Boggs* to sell them, *Tyson & Norris*, flour on credit, and that the said *A. & J. Boggs* had refused to sell to them on a credit;

that the said flour so sold for cash was sold on the 22d and delivered on the 23d of *April*, and delivered as witness supposed for shipment. *Tyson & Norris* carried on business at a place about five doors from the place of business of the said *A. & J. Boggs*, and on the same wharf; that *A. & J. Boggs* had frequently sold flour before to *Tyson & Norris* for shipment, but had for some time refused to sell to them on credit; said witness further proved, that it was then, and is now, the general usage amongst flour dealers in the city of *Baltimore*, when flour is sold for cash, to deliver the flour before the cash is called for, and that by the delivery, the seller is not under said usage considered as waiving his right to the cash payment. The defendants further proved by *Dorman*, that *Tyson & Norris* stopped payment on the morning of the 25th of *April*, 1833; that some few days afterwards, witness attended a meeting of the creditors of *Tyson & Norris*, at which *William Tyson* of said firm was present, and addressed the meeting. That *Tyson* then stated to the meeting, that he and his partner had examined their affairs, and that the utmost they would be able to pay their creditors, was twenty cents in the dollar. That *Tyson* then proposed to give their creditors twenty cents in the dollar, and to give the notes of *Tyson & Norris* (themselves) for that amount, in three equal instalments, payable one, two, and three years after date, without security; and in reply to the inquiries of some of the creditors, *Tyson* said, that they were unable to give security even for the twenty cents; and that *Tyson* required of the creditors a release of their claims, upon the giving of said notes by himself and partner. The defendants also proved by *Keller*, a competent witness on their behalf, that he was present at several meetings of the creditors of *Tyson & Norris*, and heard several propositions made by the latter to their creditors. That the first meeting took place within three or four days after the failure of *Tyson & Norris*, and that their first offer was, to pay twelve and a half cents in the dollar. That at a subsequent meeting held a few days afterwards, they offered to give twenty cents in the dollar by

their own notes for that sum, without interest, and made payable by instalments, in one, two, and three years, and that said *Tyson* then stated, that the said sum of twenty cents was the utmost which they could pay. The defendants further proved by *Prentiss*, that he knew the brig *Joseph*, on board of which, the flour and corn to which this action relates was shipped, and that said vessel was commanded by captain *Frisby*. That on the 24th of April, 1833, the vessel was lying at the lower end of *Spears'* wharf. That on that day, the said captain had applied to him for the stores of said vessel, and told witness he would get them next morning. That on the next day, the vessel was about to drop down, and did drop down from the said wharf without her stores. The defendants here offered to prove by said witness, that at the time when said vessel was so dropping down without her stores, witness asked captain *Frisby* why his vessel was going away without her stores, and that *Frisby* replied that *Tyson & Norris* had ordered him to get out as fast as possible; but the counsel for the defendants objected to the evidence so offered, and the court sustained their objection. The said witness further proved, that after the vessel had dropped down from the wharf at which she had loaded, her boat was sent back for the stores, which were supplied; that said vessel had been in the habit of getting her stores of the witness, and that she had never before left the wharf without her stores and sent back for them, as in this instance.

The plaintiff then, by consent, called *William Sealy*, a competent witness, on their behalf, and proved by him, that he was the mate on board the brig *Joseph* when the cargo was shipped in her by *Tyson & Norris*, to part of which this action relates—that she took in her cargo at *Spear's* wharf and dropped down on the morning of the 25th of April to take advantage of the tide, the vessel not being able to get out at common tide. That the wind was then to the eastward, and light, that she dropped down about half a mile, where she anchored and remained until the next day at 11 o'clock. That they had not got their stores or caulked the

hatches of the vessel when they left *Spears'* wharf, in consequence of the necessity of dropping down to take advantage of the tide, and that it did not require more than an hour in all to get their stores and fix their hatches; that on the evening of that day after the vessel came to anchor, they sent back for their stores, and got their wood; that the vessel was very heavily loaded, having on board two hundred and ten barrels of flour and forty-two hundred bushels of corn. That on the evening of the day the vessel dropped down, *Wilson*, deputy sheriff, came on board, and not finding the captain, then went to shore and made some arrangement with the captain about the vessel's waiting until the next day, but what the arrangement was, the witness did not know, except from the information of the captain, who stated to witness, that he was to wait until 12 o'clock the next day, or longer if *Mr. Whitridge* should consider it necessary, and that on the next day the vessel got under weigh, when she was pursued and overtaken by *Wilson*, and the captain agreed to go, and accordingly went back to the wharf. The plaintiffs further proved by *Fowler*, a competent witness, on their behalf, that he was the clerk of *Tyson & Norris* for about six weeks immediately before their failure, and kept their leger and cash book, and that on the 22d of April, 1833, as appeared by their books, they (*Tyson & Norris*) bought 300 barrels of flour from *A. & J. Boggs:* that from the 18th to the 25th of April, their purchases amounted to about $16,000, and their payments to about $15,000, of which latter, about $5,000 was paid for purchases during said week; that on the 24th of April, 1833, the day before their failure, they (*Tyson & Norris*) drew in all, their checks for about $14,000, of which, about $7,000 was paid, and the remainder was returned unpaid on the 25th. That none of these checks were to the witness' knowledge dishonoured before the 25th, and that witness never had the slightest notice that *Tyson & Norris* were about to stop payment until the morning of the 25th of April; that on that morning they had sent a deposite of $4,100 to the *Union Bank*, and had just despatched

another messenger with a further deposite of between three and four thousand dollars to said bank, when *Lloyd Norris*, one of the firm, came in and said he was sorry that they would be obliged to stop payment; that the *Union Bank* had refused to take checks on deposite, and they would be unable to go on. That a messenger was accordingly despatched after the deposite, then on its way to the *Union Bank*, the deposite recalled, and the notes and money borrowed, which made up that deposite, were immediately returned to the persons from whom they were borrowed. That witness was not particularly in the confidence of *Tyson*, but never heard either of them before the morning of the 25th, intimate that they were about to stop payment, or express the least apprehension of it. Said witness further proved that he filled up the bill of lading of the brig *Joseph;* that of the flour, in part composing said cargo, there was in all five hundred and ten barrels, of which, one hundred and one barrels were from the mills of *Tyson & Norris*, and the residue was not paid for: and of the corn, there was in all forty-four hundred bushels, of which, eight hundred and sixty-eight bushels were paid for, and the residue was not paid for. That the immediate cause of their stopping was the noting of their draft for non-acceptance by the plaintiffs, of which they, *Tyson & Norris*, were notified by the plaintiffs' letter of 20th April, offered in evidence. That his, the witness' impression up to the time of their failure, was, that *Tyson & Norris* were solvent, and that immediately after the failure, *Tyson* said he was quite confident they would pay all their debts, and that nobody would lose by them. Same witness further proved, that he examined the books of *Tyson & Norris* after their failure, for the purpose of making an estimate as the basis of their proposition to their creditors, and advised them, after this examination, to offer twenty cents certain to them, and to dispose of the property to the best advantage, and give them, the creditors, any surplus over twenty cents which it might yield; that in making this estimate he took into view the probable losses from their consignments in *Boston*, and the reduced

price which their whole property would bring, which latter was subject to a mortgage to the *Union Bank* for twenty-five thousand dollars, and which they, *Tyson & Norris*, valued at sixty thousand dollars, but which was in fact, afterwards sold for forty thousand dollars—that the whole amount of *Tyson & Norris'* consignments to the plaintiffs, from the 8th of March to the 22d of April, 1833, at the invoice price here, was $29,206, and that there was due to the plaintiff exclusive of the drafts noted by them for non-acceptance, $24,000 for drafts of *Tyson & Norris*, accepted by them previously to the consignment by the *Joseph*, and $6,000, a balance on the old account. That the consignment by the *Joseph* was on the account, and at the risk of *Tyson & Norris*, and that before the receipt of the plaintiffs' letter of the 20th of April to *Tyson & Norris*, the cargo consigned by it was intended for *Portland*, and that its destination was changed in consequence of the receipt of said letter. Said witness further proved that the defendants, *A. & J. Boggs*, made no demand for the cash before the failure, or witness would have paid it; that such demand was always promptly met; that he does not know whether *Tyson & Norris* ever applied to purchasers to give them credit on their purchases; that where purchases of corn and flour, &c. were made, the bills must first have been submitted to, and approved by one of the firm, and orders given by one of them to pay them; that he recollects a purchase of two lots of corn made by *Tyson & Norris* of —— *Dorman*, on the 22d and 23d of April, 1833, and that *Dorman* brought in his bills for them on the 23d, and called for the cash, and that *Tyson & Norris* then gave him all the cash he asked for: that *Dorman's* bill, first lot, was for $808.50, and the second, for $1,524.60, and that for the first, they gave *Dorman* their check on the 24th, which was not paid, and on the second, they gave him their check on the same day for $750, which was paid, that he recollects also a purchase of corn from *Mr. Crawford* on the 18th of said April, which was paid by *Tyson & Norris'* check on the 24th of that month.

The defendants then proved by *Dorman*, the witness before examined, that he sold the two parcels of corn as stated by the witness *Fowler*, to *Tyson & Norris* on 22d and 23d of April; that he sent his boy to *Tyson & Norris* with the bills for the cash three times in the course of that morning, and was unable to get it; that he then went in person and asked for payment, when *Norris*, one of the firm, begged witness not to press for payment at that moment; that witness insisted upon having the whole of the money, and *Norris* then agreed that they, *Tyson & Norris*, would give witness their check for the whole amount of his two bills if he, witness, would agree to deposite their check so that it would not come round for payment until the next day in the regular course of exchange between the banks, and would also lend them his check for $800, which the witness refused to do; that the conduct of *Norris* on that occasion, produced an impression in witness' mind unfavourable to their credit; and witness still insisted on payment, and at length they gave witness one check for $800 and upwards, which witness was to deposite, and which he did deposite, and which was returned next day unpaid, and another for $750, which he was at liberty at once to present, and which was presented, and the money received upon it on same day: Said witness further proved, that at the meeting of the creditors of *Tyson & Norris* at which he was present, he never heard either of them make any offer of the surplus which their effects might produce over and above their offer of twenty cents; but on the contrary, understood that they required a release as the condition of their offer; and also proved, that about the 22d, 23d, and 24th of April, he understood from purchasers that corn was selling for more in *Baltimore* than in *Boston;* that purchasers complained that *Tyson & Norris* kept the price too high, and that in fact *Tyson & Norris* were then giving more than other purchasers. The defendants further proved by *Robert Mickle*, a competent witness on their behalf, that he was in April, 1833, and still is the cashier of the *Union Bank of Maryland;* that for some time before the failure of *Tyson & Norris* they had been in the habit of over-checking,

and that their checks upon said Bank have frequently been refused; that it had been their daily practice for a long time to over-check there; and they had been indulged in this practice to a great extent, and made their over-drafts good; that the advances by the *Union Bank* to *Tyson & Norris* under their mortgage of their real property to the Bank, amounted to about twenty thousand dollars; that it was the practice of *Tyson & Norris* to draw drafts upon their shipments, and particularly upon their shipments to the plaintiffs, upon which they got the cash at the *Union Bank* as soon as they were drawn, and before acceptance; and that this was the case with the two drafts noted for non-acceptance by the plaintiffs, and that *Nathan Tyson*, the brother of one of the firm, was the endorser upon one of those last mentioned drafts. Said witness further proved, that on the evening of the 23d of April, 1833, after the intelligence was received by *Tyson & Norris* of the noting of their draft for non-acceptance by the plaintiffs, by the plaintiffs' letter of 20th April, *Tyson*, one of the firm, called on witness, and stated that they, *Tyson & Norris*, were just about to dispatch a cargo of corn and flour to the plaintiffs by the *brig Joseph*, and that they had no doubt that upon the receipt of it, the plaintiffs would honour their drafts, and that the noting for non-acceptance might be kept secret; and that witness in reply to *Tyson's* inquiries then gave him to understand, that if the plaintiffs accepted their drafts, the noting would not injure their credit; and that on the 20th of April, after the failure of *Tyson & Norris*, witness wrote to plaintiffs, urging them to accept the drafts of 16th and 18th April, which they had previously refused to accept, to prevent attachments being laid on the proceeds of the cargo of the *Joseph* in their hands.

The defendants then offered in evidence, the said drafts of *Tyson & Norris*, with *Nathan Tyson* endorser, which had been cashed by the *Union Bank* for *Tyson & Norris* before acceptance, and which had been noted for non-acceptance by the plaintiffs; and also offered in evidence the following accounts current rendered by the plaintiffs to *Tyson & Norris*

of the sale of all the consignments by *Tyson & Norris* to the plaintiffs, including the cargo of the *Joseph.*

1. Sales of flour and corn received per brig *Joseph* per account and risk of *Tyson & Norris.* Sales made 20th and 22d May, 1833, for cash, $3,140 01; at 4 months, $2,832; off charges, $690 39, including freight; nett proceeds $5,332 63 to credit of *T. & N.* Dated *Boston*, 11th July, 1833.

J. B. & Co.

2. Dr. *Tyson & Norris* in account with *J. Bradlee & Co.* Debits from 6th August, 1832, to 10th July, 1833, including balance of interest, $33,336 35. All the debits were drafts, except balance from old account, $2,488 95; $451 74 interest. $16,500 accepted between 2d and 16th April, 1833.

Credits from 14th August, 1832, to 10th July, 1833, $3,042 99. Sales of flour and corn, balance due $3,293 36 on interest.

11th July, 1835. Cr. Sales per *Joseph*, $5,332 62.

3. An interest account from 6th August, 1832, to 10th July, 1833, balance due *J. B. & Co.* $451 74.

The defendants further proved by *William Crawford*, a competent witness, on their behalf, that he, as the agent of the defendants, *Powell and Fiddeman*, sold to *Tyson & Norris*, on the 23d of April, 1833, the corn for which this action is brought; that on that day he had called to get payment of *Tyson & Norris* for corn sold them on the 18th, which he had called for several times before without getting it; that *Tyson & Norris* then told him they could not possibly pay it on that day, as they had already given more checks than their funds on that day would meet, but that they expected to be in funds next day, and would then pay him: that they then entered into a negociation with witness about the sale of the corn of *Powell and Fiddeman*, and wanted witness to sell it to them on sixty days credit, which witness refused to give, but agreed to let them have it on a short credit, the time of credit not being specified; that on the 24th, the next day, the witness sent three times to *Tyson & Norris* for the money on the sale of the 18th, and they at last gave him a check

for the amount, under a promise to deposite it, and that witness accordingly sent it up to the *United States Branch Bank* in *Baltimore*, where he kept his account, from which place, without his knowledge, it was immediately, and on same day, sent up to the *Union Bank*, and the money paid; that the delivery of the corn sold on the 23d April was completed on the 24th, and the bill of parcels sent round by him on that day to see if it was correct, and was returned with a note for the amount, at thirty-two days, which was in the hand-writing of witness' clerk; and which witness did not see until after the failure of *Tyson & Norris;* that after the failure, and on the morning of the 25th April, witness went to the store of *Tyson & Norris*, who told him they could not tell him any thing about their situation: and that they had been obliged to stop because *Nathan & J. Tyson* had told them that they could not get any more discounts—that witness then asked them to give him back the corn, as they knew they were broken on the 24th, and that *Tyson & Norris* then said they would return it if they could, and expressed their regret that they had forwarded the bills of lading for it the evening before: and also then told the witness that the vessel was gone; that on the 26th April witness discovered that the vessel was still in the port of *Baltimore*, and went again to *Tyson & Norris* and apprised them of it, to which they replied, that they thought she was gone, and *Tyson* said that he had assisted in getting her out; that soon afterwards, the owners of the corn and flour sued out their writ of *replevin* offered in evidence in this cause, and witness went down to the *Point*, when the *Joseph* was under weigh, and was beating out at the fort, with the wind dead ahead; that the witness then went with the deputy sheriff in pursuit of her and overtook her, when the captain drew a pistol and threatened them, but at last proposed to come back to *Baltimore* to enable the deputy sheriff to execute the writs of *replevin* in his hands, which was agreed to. Defendants further proved by said witness, that according to the usage amongst sellers of corn and flour in the city of *Baltimore*,

those articles when sold for cash are delivered before the cash is called for, and that the vendor by the delivery does not waive or vary his right under his sale for cash; that he has been in business in the city of *Baltimore* for fifteen or sixteen years, but does not recollect any case like this; that in his opinion, according to the usage, if flour, &c. is sold for cash, and the cash not paid, the vendor would have a right to take his property back, but that in such a case, if the property was destroyed, or the price fell whilst it was in the vendee's possession it would be the vendee's loss; said witness further proved, that during the spring of 1833, *Tyson & Norris* usually gave two or three cents a bushel more than other purchasers in the city of *Baltimore*, and that at the time of their purchase of witness on 23d of April, witness understood from purchasers here, that the price of corn was declining to the eastward. The defendants further proved by *Keller*, a witness previously examined, that at the meetings of the creditors of *Tyson & Norris*, at which he was present, he never heard any offer made by them to give their creditors any surplus which their property might yield, over and above the offer of twenty cents: but that on the contrary, *Tyson*, one of the firm, very emphatically stated, that if the offer was accepted, they, *Tyson & Norris*, must be entirely released. Defendants also proved by said witness, that in sales for flour for cash in the city of *Baltimore*, it is the general and constant usage for the seller to deliver the flour before the cash is asked, and that the seller is not considered by the delivery to have changed the contract, or to have waived his right to the cash payment under the contract; that a purchaser of flour for cash is not bound to hold the flour until the cash is paid, but that whilst it remained in the hands of the party to whom it was sold for cash, witness would consider, that under the usage in the city of *Baltimore*, he would have a right to retake his property if the party refused to pay the cash after the delivery, unless some credit had been given to the party after the delivery, or the seller had done some act amounting to giving the purchaser a credit.

The plaintiffs then proved by *Lloyd Norris*, that he was one of the firm of *Tyson & Norris*, and bought the flour in question for said firm of *A. & J. Boggs*, that his impression was, that the sale, although entered in their books, and the books of *A. & J. Boggs*, as made on the 22d, was made on the 19th of April, and that it was to be paid for on the 26th or 29th of April; that he recollects that at the time of sale, when one of those days, but which the witness does not recollect, was, as he thinks, agreed upon as the time of payment; that *Boggs* stated his reason for wishing to have the money on that day that he had large payments to make on that day, and showed witness his bill book referring to the payments then to be made: that at the time of the purchase, neither he nor his partner had the least notice of being compelled to stop payment; that on the evening of the 23d April they received the plaintiffs' letter of 20th April, advising them that the plaintiffs had noted their drafts for non-acceptance, and *Mr. Tyson*, one of the firm, went to see *Mr. Mickle*, and apprised him that they were then shipping a cargo of corn and flour by the *Joseph* to the plaintiffs, and that they had no doubt that the plaintiffs upon the receipt of it would honour their drafts, and that *Mr. Mickle* then stated to him that the noting for non-acceptance might be kept secret, and that if the plaintiffs accepted their drafts the noting would not injure their credit; that they accordingly continued their arrangements for the shipment by the *Joseph*, and that on the 24th April she completed her loading and dropt down, and witness on the 25th supposed she had actually sailed: that on the 24th they continued to meet their engagements and gave a great many checks, to meet which, on the morning of the 25th they made a deposite of $4,100, and had gone out and borrowed several thousand dollars more to deposite, when they were for the first time apprised that the *Union Bank* refused to take checks on deposite, and he and his partner then after consultation, came to the conclusion that they would be obliged to stop, and accordingly, about 11 o'clock on the morning of the 25th, they resolved to stop,

and recalled a messenger who had been sent by them to make a further deposite in the *Union Bank*, and restored the money and checks which they had borrowed to make said deposite, to the persons from whom they had borrowed them. That until that morning they had not the slightest notion of stopping, and did not know or believe before their failure, that they were insolvent, or that they would not be able to meet their engagements, or any of them; that immediately after their failure they returned some flour which they had bought, and were shipping for *Savannah*, to the persons from whom they had purchased it, including one hundred barrels which they bought of the defendants, *A. & J. Boggs*, on the day before their failure, and which they, *Tyson & Norris*, returned to them; that at the time of their failure their debts amounted to about $90,000, and they had large quantities of produce in the hands of the plaintiffs, and of another house in *Boston* to a still greater amount; and that they had drawn upon the latter before their failure for several thousand dollars more than their consignments to them produced, so that they (*Tyson & Norris*) are still largely indebted to the latter. That the offer of twenty cents in the dollar to their creditors was made some eight or ten days after their failure, and after *Mr. Fowler* had examined into their condition; and that it was as much, as upon that examination it was thought, their property would produce; that they sustained heavy losses by their shipments to *Boston*, not less than twenty thousand dollars, and a small loss of two or three thousand dollars by their shipments to *New York;* and that their whole property, which they estimated at sixty thousand dollars, did not produce near as much; that when the estimate was made with a view to the offer to their creditors, the losses by shipments, &c. were not ascertained, but they made allowance for the probable losses by them; that they had frequently had difficulties before their failure, and ever since the failure of *Elisha Tyson, Jr.* but had always been able to meet their engagements: that their purchases of corn and flour had not generally been made as mere expedients to raise money, although

they had sometimes raised money in that way. The plaintiffs further proved by *William Tyson*, that he was one of the firm of *Tyson & Norris*, that he had a conversation with his partner, *Norris*, shortly after the flour in question was bought by him of *A. & J. Boggs*, in which his partner told him that the flour had been bought on a short credit; that just before their failure witness met *Mr. A. Boggs* of said firm, and conversed with him in reference to this purchase. *Boggs* said to witness, "you know, *Mr. Tyson*, that our cash sales to you mean eight or ten days." Said witness further proved that he bought the corn in question of *Crawford*, and that it was bought on a credit of thirty-two days; that the cargo of the *Joseph* was originally destined for *Portland*, but was shipped to *Boston* because of the plaintiffs' letter of the 20th of April; and also, that he held the conversation with *Mr. Mickle* as stated by the witness, *Norris;* that he never assisted the captain of the *Joseph* in getting out from the wharf, and did not recollect telling *Mr. Crawford* that he had done so, and that he never gave the captain any direction about getting her under weigh as quickly as possible, or hurrying her off before she was ready to sail; and that in fact on the morning of the 25th, when he conversed with *Crawford*, he thought she was gone; that he and his partner had no idea of stopping, until the morning of the 25th, when he himself advised it under the circumstances and for the causes stated by his partner, the witness, *Norris;* that at the time when the purchases of the corn and flour in question were made, they did not believe that they were insolvent or would have to stop payment, and that they did expect, and intend to pay for them according to their contract.

The defendant further proved, that the whole property of *Tyson & Norris*, which was under mortgage to the *Union Bank*, was also under a subsequent mortgage in 1827 to secure the sum of $6,000 to the wife of *Lloyd Norris*, which said *Norris* had received from her estate.

The plaintiff then prayed the court to instruct the jury as follows:

No. 1. That if the jury shall believe from the evidence in the cause, that the sale of the flour in question was made by *John & Alexander Boggs* to *Tyson & Norris* on or before the 22d of April for cash, and that it was delivered on the 23d, and that from and after the delivery, the *Boggses* relied on the individual responsibility of *Tyson & Norris* for the payment of the purchase money, that then from the time of such delivery in the absence of fraud, the property in said flour was vested absolutely in *Tyson & Norris.*

No. 2. That if the said contract is in law such an one as may be explained by evidence of usage, there is no evidence of any such usage in this case in relation to the said contract, as to give it a different legal operation, than if no evidence of any kind had been offered in relation to the usage. Which prayers were rejected by the court, and the court informed the jury, that the usage offered in evidence, combined with the other facts in the cause, although said usage might not control or govern the legal operation of the contract, yet the same with said facts were evidence, from which the jury might infer, that there was not an unconditional delivery of the goods. That whether there was or was not an unconditional delivery of the goods, was a question of fact under the evidence, for the consideration of the jury.

The defendants excepted to said instructions.

These 1st and 2d prayers and instructions, are called the additional prayers in the arguments of the counsel.

The defendants then prayed the court to give the following instructions to the jury.

1. If the jury believe that the *replevin* issued in this cause was served before the completion of the service of the first *replevin* upon the same property, and while the property was in the custody of the sheriff, that plaintiffs cannot recover.

2. If the jury find that the *replevin* issued in this case, was for property not jointly owned or jointly taken by defendants, but part owned and taken by Messrs. *John Boggs & Co.* and part owned and taken by *Powell & Fiddeman*, then the plaintiff cannot recover in this suit.

3. If the jury believe that the sale made by *John Boggs & Co.* was for cash, to be paid on delivery, and that such sale was a conditional one, as against the vendor, and that said *Tyson & Norris* neither paid nor offered to pay said money to said *John Boggs & Co.* no title vested in them as against the vendor, and plaintiffs are not entitled to recover.

4. If the jury believe that at the time *T. & N.* made the purchase of *Powell & Fiddeman* and *John Boggs & Co.* they were largely insolvent, and knew themselves to be so, and concealed such insolvency, and that said *P. & F.* and *J. B. & Co.* neither knew of such insolvency, nor had the means of knowing it, then the sale is void; unless the jury believe, that the plaintiffs are *bona fide* purchasers for value of said property, and there is no evidence of their being such purchasers.

5. If the jury believe that the property sought to be recovered in this suit, was bought and shipped by *Tyson & Norris* for their own account to the plaintiffs, and that neither the bill of lading nor the property ever came to the hands of the plaintiffs, at or before the institution of this suit, and that no orders for the purchase of said property was ever given to said *Tyson & Norris* by the plaintiffs, or either of them, the plaintiffs cannot recover.

6. That if the jury find from the evidence the facts stated in the defendants' second prayer, and also, that the said several *replevins*, of *A. & J. Boggs*, and of *Powell & Fiddeman*, were issued on different days, and without any concert between *Boggs* and *P. & F.* placed in the hands of said sheriff; that on the 25th of *March*, the said sheriff went with the *replevin* of *A. & J. Boggs* to the brig *Joseph*, and there agreed with the captain of the said brig, that he, the captain, would wait until the next day to see whether some arrangements could be made for the adjustment of said *replevin*, that on the succeeding day, *Powell & Fiddeman* issued their said writ of *replevin*, and placed it in the hands of the said sheriff, and that said *replevin* being so in his hands, it was ascertained by the sheriff, that the said vessel was getting under weigh, and that the said sheriff took a vessel, and

went with *J. Boggs* and the agent of *P. & F.* or either of them, in pursuit of said vesssel for the purpose of taking said property under and agreeably to said several *replevins*, and putting it on board the vessel so taken by the sheriff; that on arriving at the brig *Joseph* the captain of said vessel, voluntarily proposed and agreed, to come back to *Baltimore* to enable the sheriff to take the property under said several *replevins*, and in fact returned, and that *A. & J. Boggs* never in any wise interfered with the possession of the corn, nor *Powell & Fiddeman*, or their agent, with the possession of the flour, then the plaintiffs have improperly joined in this action, two distinct causes of action against the said *A. & J. Boggs*, and the said *Powell & Fiddeman*, and therefore are not entitled to recover.

7. That if the jury find from the evidence, that before the bringing of this action, the defendants, *J. & A. Boggs*, had sued out their writ of *replevin* offered in evidence in this cause for the flour for which this action is brought, and the defendants, *Powell & Fiddeman*, had also sued out their writ of *replevin* offered in evidence in this case for the corn for which this action is brought; that under said writs, the sheriff of *Baltimore* county, before the bringing of this action, had seized and taken into his custody the said corn and flour, being then on board the brig *Joseph*, and that whilst the said sheriff, under and in execution of said writs, was engaged in taking said corn and flour out of said brig, the writ of *replevin* in this action was issued, and delivered to the said sheriff; and that under said last mentioned *replevin* the said sheriff, the said property being so in his custody, *replevied* and delivered the said property to the plaintiffs in this action, or their agent, without ever, in fact, having delivered the said corn or flour to the said defendants respectively, under their said *replevins*, and without any acknowledgment of the delivery of the said flour, by the said *A. & J. Boggs*, or either of them, or of the said corn by the said *Powell & Fiddemen*, or either of them, before the said property was so *replevied* under the writ of *replevin* in this cause, then the plaintiffs are not entitled to recover in this action.

8. That if the jury find the facts stated in the preceding, the defendants first prayer, except only that they find, that before the execution of the writ of *replevin* in this action, there was an acknowledgment of delivery by the defendant, *John Boggs*, as stated by the witness, *Murray*, then the plaintiffs are not entitled to recover the corn for which this action is brought.

9. That if the jury find from the evidence that, before the bringing of this action, the flour for which it was brought, was obtained by *Tyson & Norris* from the defendants, *A. & J. Boggs*, and the corn for which it is also brought, was obtained by said *Tyson & Norris* from the defendants, *Powell & Fiddeman*, under several and distinct contracts with said defendants respectively, and that being so obtained, the said flour and corn were shipped by said *Tyson & Norris* on board the brig *Joseph*, and that whilst there, and before the bringing of this action, the defendants, *A. & J. Boggs*, *replevied* the said flour, and the said defendants, *Powell & Fiddeman*, *replevied* said corn under their several writs of *replevin* offered in evidence in this cause, and that the said *A. & J. Boggs*, never claimed or took possession of said corn under their said *replevin*, or otherwise, and the said defendants, *Powell & Fiddeman*, never claimed or took possession of said flour under their said *replevin*, or otherwise, at any time before the bringing of this action, and that the plaintiffs or their agents, sueing out the *replevin* in this case, knew the facts above stated before this action was brought; that then the plaintiffs' causes of action, if they have any, against the said *A. & J. Boggs*, and the said *Powell & Fiddeman*, for the taking or detention of said corn and flour so obtained, under their said *replevins*, are wholly distinct, and independent causes of action, against the said *A. & J. Boggs*, and the said *Powell & Fiddeman*, and the plaintiffs have improperly joined them in this action, and are therefore not entitled to recover.

10. That if the plaintiffs, upon the evidence in this cause, have any right of action for the recovery of the proper-

ty for which this action is brought, their right and cause of action against the defendants, *A. & J. Boggs*, is wholly distinct from, and independent of their right and cause of action against the defendants, *Powell & Fiddeman*, and that the plaintiffs have in this action improperly joined such distinct and independent causes of action, against the said *A. & J. Boggs* alone, and the said *Powell & Fiddeman*, and are therefore not entitled to recover."

Which, and each of which instructions, the court (*Archer*, Ch. J.) refused to grant, but gave and granted to the jury the following prayers, directions, and instructions:

1. If the jury believe the contract for the sale of the goods in controversy was for cash, and that there was an unconditional delivery of the goods to *Tyson & Norris*, and that there was no fraud in the sale, then the legal title to the goods vested in *Tyson & Norris*, and it was competent for them to pass the title to the plaintiffs; although they had not complied with the terms of the contract in paying for the said goods.

2. If the jury believe the sale was for cash, then *Tyson & Norris* acquired no title to the goods without the payment of cash, unless the jury should believe that the defendants waived the cash payment by delivery; and if the jury find they did waive the cash payment by delivery, then the title vested by the delivery in *Tyson & Norris*.

3. If the jury believe that it was the usage and practice among merchants and dealers, when articles of merchandise are sold for cash, to deliver the articles without demanding the cash at the moment of delivery, then the jury are at liberty to infer that the defendants were acting in reference to such usage, and from such usage and the evidence in the cause, that the delivery was not a waiver of the cash payment, and if the jury should find the delivery was not a waiver, then the delivery of the goods did not vest the title in the vendees, if the jury find that they did not make payment for the said goods. When the court in these directions speak of a conditional delivery, and of waiving cash payments, they mean

to leave it to the jury to determine whether, in the delivery, the party meant to relinquish his right over the property, or meant to resume it in case the cash was not paid; or, in other words, did the defendants, in the delivery, mean or not, to waive any of their rights under the contract of sale and delivery.

4. If the jury believe the contract was made by *Tyson & Norris*, when in point of fact they were insolvent and unable to pay their debts, and that *Tyson & Norris* were aware of their situation, and that they had no expectation of paying the sum contracted to be paid according to the contract, and that the defendants, by ordinary prudence, could not have known of the existence of such facts, and that such facts were concealed from the defendants by said *Tyson & Norris*, and that they did in fact stop payment on the 25th of April, 1833, and did shortly after apply for the benefit of the insolvent laws, and failed to pay for the said goods, then the contract of sale was fraudulent and void, and the delivery passed no title to *Tyson & Norris;* and in such case, the plaintiffs acquired by the bill of lading and transfer no title to said goods, unless they became creditors subsequent to the delivery of the goods to *Tyson & Norris.*

5. If the jury believe from the evidence that the sale and delivery of the goods in controversy were made as stated in plaintiffs' first prayer, then the title to the goods vested by such sale and delivery in *Tyson & Norris*, notwithstanding they were insolvent at the time of such sale and delivery, and knew that they were so insolvent, unless the jury shall also find, that at the time of such sale and delivery said *Tyson & Norris* knew that they were not able to pay for the goods, and that they would not be able to pay for them, and neither intended nor expected to pay for them, and made said purchase, and obtained such delivery, with such knowledge, expectation, and intention.

6. If the jury find the sale and delivery as stated in plaintiffs' first prayer, and that at such sale and delivery, *Tyson & Norris* intended to pay for them, then the title vest-

ed in them in the goods, notwithstanding the said *Tyson & Norris* were then as greatly insolvent as they proved afterwards to be, and knew that fact.

These prayers were granted, provided the jury believe that the delivery of the goods was an unconditional delivery.

7. That if the jury find from the evidence that before the bringing of this action, the defendants, *A. & J. Boggs*, being the owners of the flour for which this action is brought, sold it for cash to *Tyson & Norris*, and delivered it to *Tyson & Norris* under said sale, and that they, *A. & J. Boggs*, did not intend by said delivery to give credit for said flour to *Tyson & Norris*, or to waive their right to the cash payment under said contract—that after said delivery *Tyson & Norris* consigned it to the plaintiffs, on the account, and at the risk of them, the said *Tyson & Norris*, and that the plaintiffs never purchased said flour from *Tyson & Norris*, nor made them any advances, nor contracted for them any responsibilities upon said consignment; and also, that according to the general and known usage amongst flour dealers in the city of *Baltimore*, in sales of flour for cash, it is usual for the seller to deliver the flour before the cash is received or required, and that according to said usage, the seller, by its delivery, is not considered as waiving his right to the cash agreeably to the contract, and that there was no unreasonable delay on the part of *A. & J. Boggs* after the delivery of said flour in requiring the cash or the return of their flour under said contract, then the plaintiffs are not entitled to recover. When the court in these directions speak of a conditional delivery, and of waiving cash payment, they mean to leave it to the jury to determine, whether in the delivery, the party meant to relinquish his right over the property, or meant to resume it in case the cash was not paid; or in other words, did the defendants in the delivery mean or not, to waive any of their rights under the contract of sale and delivery.

8. That if the jury believe, that at the time when *Tyson & Norris* purchased the corn, for which this action is brought, of *Powell and Fiddeman*, they, *Tyson & Norris*, were insol-

vent, and knew themselves to be so, and had no reasonable expectation of being able to pay for said corn; and that knowing their insolvent condition, they concealed it from the said *Powell & Fiddeman*, and their agents who made said sale, and that *Powell & Fiddeman*, and their said agent, did not know the insolvent condition of *Tyson & Norris*, and had no means of knowing it, either at the time of the purchase or at any time before the delivery of the corn to *Tyson & Norris*, and that *Tyson & Norris* made said purchase for the purpose of getting possession of said corn without paying for it, and transferring it to the plaintiffs, either to secure a previous debt due by them to the plaintiffs, or to protect their endorser, *Nathan Tyson*, against his previous responsibilities for them by endorsement, and that the plaintiffs never purchased said corn of *Tyson & Norris*, nor made them any advance, nor contracted any responsibilities for them upon said corn, then the said purchase and delivery of the corn, vested no title to it in *Tyson & Norris*, and the plaintiffs are not entitled to recover.

9. If the jury believe the goods were purchased on credit, and not for cash, and that the property was delivered them in the absence of fraud, the plaintiffs are entitled to recover.

10. If the jury believe that *Mr. Boggs*, one of the defendants, agreed to dispense with the actual delivery of the goods *replevied* by him, and to consider them as delivered, so that the plaintiffs' *replevin* might be executed in the same manner as it would have been if the *replevin* by *Boggs* had been first executed, and the goods delivered, then it is not competent for *John & Alexander Boggs*, or either of them, to object that the said goods at the time of the execution of this *replevin*, were in the custody of the law, and not liable to *replevin*.

11. If the jury find the agreement in the preceding prayer, and that the same was known to the other defendants at the time they signed the receipts of the 29th April for the corn, and that said defendants thereby meant to ratify and confirm what the sheriff had done, and to waive the irregularity which

might have existed in serving the present *replevin*, then it is not competent for the defendants, or either of them, claiming to be the owners of said corn, to object that the said goods were in the custody of the law, and not liable to *replevin*.

To which refusal of the court to grant the above rejected ten prayers of the defendants, and to the refusal to grant each of them, and to the granting of which prayers and instructions by the court, and to the grant of each of which, the defendants, by their counsel, prayed the leave of the court here to except.

The jury found a verdict for the plaintiffs on both issues, with nominal damages; a motion for a new trial being overruled, the defendants brought the present appeal.

The cause was argued before STEPHEN, DORSEY, CHAMBERS, and SPENCE, Judges.

McMAHON, for the appellant, contended:

1. That the goods for which this *replevin* issued, were in the custody of the law when they were *replevied* under the writ in this case, and were therefore not *repleviable;* and that being so in custody of the law when they were *replevied*, the agreement of *Boggs*, and the subsequent receipts of the defendants for the delivery of the property under their respective previous *replevins*, did not preclude the defendants from making this objection; and especially not as to the corn *replevied;* and that, therefore, the court below erred in rejecting the defendants' 1st, 7th, and 8th prayers, and in granting their 10th and 11th instructions to the jury.

2. That upon the state of facts presented by the defendants' 2d, 6th, 9th, and 10th prayers, and sustained by the whole evidence in the cause, the plaintiffs had improperly joined in this action two distinct torts and causes of action, to wit, the tort of the defendants, *A. & J. Boggs*, in taking and detaining the flour, and the tort of the other defendants, *Powell & Fiddeman*, in taking and detaining the corn. That these torts being thus separate and distinct, and the defendants, *A. & J. Boggs*, having had no connection with or agency in

the commission of the tort of *Powell & Fiddeman* as to the corn, and so *vice versa*, the joinder of these distinct torts in one action, against the whole four, is a fatal misjoinder, and the court below therefore erred in rejecting the defendants' said 2d, 6th, 9th, and 10th prayers.

3. This arises under defendants' 3d prayer, and under the court's 1st, 2d, 3d, and 7th instructions, and additional instruction No. 2, added to the record by agreement, as to the force of the usage, under which the defendants' counsel will contend, that the court receiving the evidence of the usage as to delivery of goods on sales for cash, and admitting its application on the question, as to the nature of the delivery, as conditional or otherwise, erred in the said instructions as to the effect ascribed by them to such usage if found by the jury, and especially in directing the jury, that the usage did not control the legal operation of the contract, that if found, they were still to find that the parties acted in reference to it; and that even if usage found, and also that parties in the delivery acted in reference to such usage, in still leaving it with the jury to find the delivery conditional or otherwise.

4. This point arises under defendants' 4th prayer, and the court's 4th, 5th, 6th, and 8th instruction, all relative to fraud in the sale founded on the known and proved insolvency of the purchasers, *Tyson & Norris*, by consignment from whom the plaintiff claims; and under this it will be contended, that there is no proof in the cause that the plaintiff was a purchaser of the goods for a valuable consideration, but is shown by all the proof to have merely obtained as a security for an antecedent debt, and that therefore the court below erred in rejecting defendants' 4th prayer, and in assuming in the instructions above mentioned that there was evidence on both sides of the question. And it will also be contended, that the insolvency of *Tyson & Norris*, at the time of the purchase, known to themselves and concealed from the defendants; and, at all events, if coupled with the additional fact, that they had not at the time of the purchase a reasonable expectation of being able to pay for the goods, was in law

a fraud vitiating the sale; and that it was not necessary to make it such, to find the additional fact, that they did not intend to pay for them.

5. This is presented in the 5th prayer, and relates to the plaintiff's title to the goods *replevied* at the time of suit brought. And the point is, that *Tyson & Norris*, having purchased and shipped them on their own account, and at their own risk, and not under any orders from the plaintiff, and the plaintiff at the time of suit brought not having received the property, nor even a bill of lading for it, he, the plaintiff, had not title to maintain the action in his own name.

In argument, I propose to consider the 1st, 7th, and 8th prayer of the defendants, with the 10th and 11th instructions given by the court. An erroneous practice has crept in, in rejecting prayers and granting instructions. Alternative propositions are often overlooked, and the jury thereby misled. The inquiry here is, was the instruction granted proper, was the 8th prayer properly refused. The case looks like contempt of the process of *replevin*. The plaintiffs were agents of *Tyson & Norris*. The property was shipped on the faith of expected acceptances. There was an implied pledge of acceptance of drafts, never performed. The plaintiffs claim and hold on for antecedent debts. They are not purchasers for a valuable consideration. They had no better equity than *Tyson & Norris* have, and they are covered also with a breach of faith, in refusing to accept the bills drawn. *Tyson & Norris* could not maintain *replevin;* they could not institute the *second replevin*, even after delivery of the goods under the first. They could not reclaim the property; many States have settled this. The first action of *replevin* would have settled the right, and the property is under the protection of the law, by delivery under the first writ. The answer to this proposition, I suppose, is, that *Bradlee* is another party, with distinct rights from the defendant in the first *replevin*.

Then when does the plaintiff's right commence? In all actions, the plaintiff must have a right at common law, and when the liability of the defendant occurred, after the writ

issued, the action was not maintainable. This is true as to torts and trespass prematurely brought. The *replevin* here only involves title. It is co-extensive with trover. Its elements are property in plaintiff,—detention by defendant, and if before suit, *no detainer*, then no right to sue. A subsequent detainer will not do. The property sold to *Tyson & Norris* was by them shipped, was brought back to the wharf by the *Boggs*, and then for the first time delivered to the defendants. The possession of the officer is the possession of the law, and not of the defendants. The defendants acknowledged no possession until delivery to them; this was on the 27th, and had no existence, when the action was brought on the 26th. The custody of the law remains until its incidents are performed. The duty of appraising is one of them. The appraisement of the sheriff is an important part of his duty. No appraisement had been made under the first writ, when the property was taken under this writ. *Boggs'* act is relied upon to relieve the sheriff from this duty. He had no such power, and his consent to that effect is invalid. *Powell & Fiddeman* were owners of the corn. *Boggs* was owner of the flour. *Crawford* was agent for the corn. The agreement was with *Murray*, the deputy sheriff, and *Boggs*, alone. It could not affect the corn. The receipts are from both parties.

The 11th instruction if it assumes that the agreement with *Boggs* was made with the knowledge of all parties, is not founded on evidence. Motives of agreements are ascertained by reference to the parties; that with *Murray* merely related to *Boggs'* flour.

Has the plaintiff a right to take advantage of this constructive delivery; can he who has done wrong put one writ in conflict with another? can he cure his wrong by adopting the agreement to waive delivery? It was wrong in the sheriff to make it; he cannot thus put the defendant in possession of property, for the action of this *replevin*. This agreement cannot operate as an estoppel; estoppels in *pais* are reciprocal, and are so from the agreement of parties. This cannot apply here. Agreement was between the sheriff and one defend-

ant; it cannot estop the plaintiff; it was not reciprocal as to him; the sheriff was not the agent of the plaintiff. This is not a technical estopel; the object of the agreement was merely to shield the sheriff from responsibility for a violation of his duty.

The 2d point involves the 2d, 6th, 9th, and 10th prayers of the defendants.

The plaintiffs have improperly joined two distinct parties. It is a misjoinder of rights. The torts were separate. This is a fatal misjoinder.

The 6th prayer presents all the material questions.

Distinct owners of corn and flour—distinct sales—each in the first instance took out a distinct *replevin* for a different part—neither claiming an interest in the property of the other, and these facts known to the plaintiffs in this action.

Can the plaintiff unite two different claims against different parties in the same action?

Test this inquiry by analogy to *trover* and trespass. *Replevin* in a limited sense is like both. *Trover* for damages—*replevin* for the thing. But the rules of joinder are the same. Where there must be different verdicts and judgments, the claims cannot be united. Mixing of claims might confuse. Multifariousness is to be avoided. Misjoinder of persons is error; this is applicable to contracts, though not to torts. Misjoinder of persons in tort is not fatal. But this is a misjoinder of causes of actions and persons—both here are wrong. One writ cannot perform the appropriate duties of two suits. Distinct torts cannot be joined in the same cause. *Gould Plea.* 209. 1 *Chit. Plea.* 98. 1 *Bac. Abr.* 54, 55. Several distinct causes of action cannot be joined in the same writ. *Jackson vs. Hagen, et al,* 20 *John.* 438. 17 *Mass.* 185, 187.

If the position of the parties here were reversed, and the defendants had sued jointly, the action could not be maintained on the proof of the goods merely being in the same ship. 1 *Co. Litt.* 145. 1 *Chit. Plea.* 73, 74, 187. *Sprague vs. Kneeland,* 12 *Wendell,* 164. The effect of such an action

on the party wrong joined, as a witness in the cause, is a material consideration. *Boggs* could not be a witness for *Powell.* This practice breaks down the rules of evidence.

Then how is the verdict to be rendered. It must be general, not for *Boggs* for the flour, and *Powell* for the corn. There can be but one verdict and judgment. Its effect on the damages illustrates the rule.

The 3d point relates to the 3d prayer, and the 1st, 2d, 3d, and 7th instructions, and the additional instructions on the subject of usage. Delivery is an equivocal act, and it was left to the jury to determine its effect. But the evidence was of an usage known and uniform, and this usage enters into the contract. The usage establishes that the lien was never surrendered. The jury finding the usage, cannot find other than a conditional delivery. Delivery, in the absence of proof, corresponds with the usage. The jury can make no inference, in opposition to usage; without proof the usage controls. The usage established, the parties acted under it, hence the delivery must have been conditional, but instead of that as a legal conclusion, it is put to the jury, whether there was a waiver of the lien or not, they were not directed to follow the conclusion of law. The court erred in treating the usage as evidence, after it had been established.

The 4th point relates to the 4th prayer, and 4th, 5th, 6th, and 8th instructions.

Fraud in the sale. It vitiated title in the purchaser; in the hands of *Tyson & Norris;* and in the hands of the plaintiffs, who did not take it for value, but for antecedent liabilities.

The 4th prayer proceeds on the ground of defect in the evidence, and is defective in assuming the plaintiff to be a subsequent creditor, of which there is no evidence. There were no advances after the shipment of this cargo. It left the jury to assume another equity than that which *Tyson & Norris* had. It gave the plaintiffs the advantage of being creditors in the transaction.

The 5th point relates to concealment of a fact in the knowledge of the purchaser not known to the vendors, and

of which the latter had no means of knowledge. This is a fraud which vacates the sale.

The court below said that insolvency, and the concealment of it when known, and the inability of the vendor to discover the fact by ordinary prudence, is not sufficient to constitute a fraud in the sale. *Tyson & Norris* knew of their insolvency; the course of their trade informed them of it; they were purchasers at a high, and vendors at a low market. Every step made their affairs worse. "In *England* the wind raises the kite, but in this transaction the kite raises the wind." The corn purchased was to be turned into gold at a known loss. They received it after knowledge of insolvency, a circumstance to be considered in connection with fraud. I do not impute fraud as the result of simple insolvency where unknown, or not concealed by a purchaser; but if he knows his insolvency and conceals it, this is evidence of fraud. Fraud is equally perpetrated by the statement of a falsehood, or suppression of a truth. The inquiry is, is the matter stated or suppressed, material to be known; under the circumstances here belief of solvency in *Tyson & Norris*, was implied. If *Tyson & Norris* had stated they were insolvent, who can doubt the result? The law exacts facts peculiarly within the knowledge of the purchaser. He is bound to disclose such. His own condition and private affairs of which he had knowledge. This case is clear of all difficulties. The fact of insolvency cannot impeach the sale, but upon known insolvency and concealment, the contract was vitiated. I do not depend on the fact standing alone, nor affecting third parties. It is between buyer and seller. And the rule is more just and imperative, as between them. They should not be permitted to retain property thus acquired; and the law, in the absence of decisions to the contrary, should not sanction it.

But let us concede that the rules of law require us to go further, and establish that *Tyson & Norris* had no reasonable expectations of being able to pay their debts. Admit that this is to be added to the principle. The expectation, to

aid the purchaser, must be a reasonable one, not vain and ridiculous. *Hawse vs. Crowe*, 21 *Serg. and Low.* 477. That a party never intended to pay is a legal conclusion from known insolvency; the party having no reasonable expectation of being able to pay. The presumption of law not to pay, follows the want of a reasonable expectation of being able to pay.

The last point in the statement refers to the shipment being for *Tyson & Norris'* own account. There was no order for the corn or flour. No title in the factor. No muniment of title with the plaintiff at the time of suit brought; no delivery, actual or symbolical. Can a factor maintain *replevin* before delivery, actual or constructive. The cases decided, are where the factor had what was equivalent to delivery before the action was commenced. Here, the suit was brought in the name of the plaintiff before he could have known of the shipment of the goods. The right of lien does not attach until reception of the bill of lading. *Walter, et al vs. Ross, et al*, 2 *Wash. C. R.* 284. *Ryberg & Co. vs. Sneel, Ib.* 403.

R. Johnson, for the appellees, contended:

1. That there was no misjoinder of parties defendants in the *replevin.*

2. That, from the evidence in the case, the court were right in leaving it to the jury, as they did in their 10th instruction, to find, that when the *replevin* in this case was served, the defendants had agreed to consider the goods seized under their *replevins* as in fact delivered, and thereby that they were not at liberty to set up the want of actual delivery, as a formal objection to the regularity of the service of the present *replevin.*

3. That upon the questions of fraud and conditional delivery in fact, or according to usage in such sales, the court in their several instructions to the jury pronounced the law of the case, and consequently, that there is no error, for which the judgment can be reversed, in the rejection of either of appellants' prayers on those questions.

I insist that the law, as actually announced by the county court to the jury, was correct.

The 2d point of the appellant relates to a question of form. It admits title, and a separate right of action in each defendant in the *replevin*. In trespass, this produces no non-suit. There may be different judgments. This doctrine, though not denied, is only applied where the trespass is in its nature incapable of being committed jointly. It is not an inquiry into the fact.

In 1 *Chitty*, 98, there are some torts which, in legal consideration are not several, as verbal slander. The action must be against one, alone. But if trespass may be committed by two, and the proof confines it to one, it is only followed by a partial failure of the plaintiff. If the analogy is followed, the tort here might unite all the defendants in the wrongful taking and detaining. So all the plaintiff can lose, is as against the one, not concerned. But even in cases when two persons ought not to be joined, the 2d, 9th, and 10th prayers, which relate to these questions, ought not to be granted. These go to defeat the action, which is not sanctioned by *Chitty*. See the effect of a joinder in slander; the defendants may *demur*. But the objection may be avoided by a *non pros.* or a release of damages as to all, but one. And all the court did here, was to refuse to declare that the plaintiff was not entitled to recover against some of the defendants. In reason there is no objection to this procedure.

The counsel has assumed a title in these defendants which the verdict denies. The custody of the law is not in issue here, but the objection relates to a case where, the undisputed owner is plaintiff, and several set up title; their claim is to defeat the whole action. It is founded on the existence of too many defendants.

The property was shipped on the 24th. On the 25th a bill of lading was forwarded to the plaintiff, and for value. This title is good against all the world but *Tyson & Norris*, it being for previous advances.

With reference to the case in 12 *Wendell*, 162, the defence

arising from the misjoinder, looks only to the extent of the judgment. It was not a defence to the action. The case was *replevin* for a horse against two, who had taken him at different times. The same doctrine is maintained in *Gould on Pleading*. The rule depends not on the fact, but on the character of the wrong. As it is true that the action of trespass will lie against more than one, and as the innocence of one, in fact or in law, is not a bar to the action, what objection can there be when the ground taken in defence assumes the guilt of the defendant, and simply denies responsibility to the whole extent of the plaintiffs' demand, to permit the action to proceed? If one entirely innocent may be united in the action with a guilty party, without defeating the action, why may not two, in part guilty, be united? The objection is grounded upon the distinct motives of the two defendants in bringing back the vessel; each wanted the property he had sold. Every agent has a different motive in the transaction—sheriff, labourers, and lawyer; but if they all united, they are all responsible for their act. The act of one, is the act of all. It cannot be that where several entering into a house, claiming and taking away separate portions of its contents, all are not responsible with reference to the party injured. If the refusal of the defendants' prayer was correct, the instruction given on that head was also correct.

Upon the 1st point, and 1st, 7th, and 8th prayers, and 10th and 11th instructions, after stating the nature of the objection, the counsel denied that this was the *replevin* of *Tyson & Norris*. He said it was not denied that cross *replevins* might be maintained. Then was the last *replevin*, in fact the action of *Tyson & Norris*? Who were *Tyson & Norris*? Who the plaintiffs? The plaintiffs, from 1832 to 1833, were the consignees of *Tyson & Norris* for the sale of produce, and accounted for proceeds to a large amount. It was the practice of *Tyson & Norris* to draw on the faith of the shipment, and their bills were accepted to enable them to procure advances. Plaintiffs came under acceptance to too large an amount. They refused further to accept, and in consequence

this shipment, destined for another port, was consigned to the plaintiffs. The bill of lading was sent them under the hope they would make further acceptances, and of drafts which they had previously noted. The bills of lading went on, and the vessel sailed from port. The question of ownership is as between plaintiff and defendant, and *in this point Tyson & Norris* are admitted to have no title.

A bill of lading is a negotiable instrument. *Lickbarrow vs. Mason*, 2 *Term Rep.* 63. And the only escape from the effect of the bill of lading, or the claim of the plaintiffs, arises from their insolvency. The bill of lading is a muniment of title; it is an infallible muniment, except as regards the vendor's right to stop *in transitu*. This right is personal to the vendor. A *tort-fesor* cannot protect himself by this privilege; it is founded on equity with reference to ownership; it is intended to protect the vendor against the vendee. It ceases with the possession of the vendee. *Walter, et al vs. Ross, et al*, 2 *Wash. C. C. R.* 294. *Ryberg & Co. vs. Sneel, ib.* 403.

An assignment of a bill of lading, to cover previous advances, is absolute, and defeats the right to stop *in transitu*. *Schimmelpennick vs. Bayard*, 1 *Pet. S. C.* 386. *Conard vs. Nicoll*, 4 *Pet. S. C.* 291. *Wood vs. Roach*, 2 *Dallas*, 180. *Woods vs. Roach & Crawford*, 1 *Yates*, 177. *Summeril vs. Elder*, 1 *Binney*, 106. *Stor. Abbott*, 308, 388. *Owings & Cheston vs. Nicholson & Williams*, 4 *Har. and John.* 107.

We do not deny that goods in the custody of the law are *irrepleviable;* still the right of property may be controverted in another suit, as in trespass or in trover. The legal custody does not take from the paramount owner the right to recover the value of his goods pending the custody, or after that has terminated, the specific goods from a third party. The objection prevents all interference with the goods so long as the custody continues, and the reason is, that if it were not so, the particular controversy in which the goods were taken, could never be settled. It is the privilege of the *first* plaintiff and the officers of the law, and to give the *first* plaintiff the fruits of his action. If only the true actual owner could main-

tain *replevin*, the courts would suffer it to proceed, but other persons may, as against wrongdoers. It is, therefore, a privilege which the plaintiff, in the first action, may waive, as any private right might be waived. Then did the defendants waive this privilege. There was no other right in the defendants in the *first replevin* than that of stoppage *in transitu* resulting from their consignees' insolvency. Those defendants were *Tyson & Norris*, who do not set up that right. They came forward as the plaintiffs' witnesses, and concede the plaintiffs' right to the property. This property being parted with by the sheriff, is not in the law. The legal custody had ceased. The custody under the first *replevin* was for the benefit of the plaintiff in that writ, and to enable the officer to do his duty; and the plaintiff may waive it.

Replevin is to try title; it is co-extensive with *trover*, and may be brought in all cases by the owner, except where the goods are in the custody of the law, or where there are cross *replevins*.

There was then a waiver of the custody under the first *replevin*. Was there sufficient evidence of the fact? This inquiry arises on the 10th and 11th instructions. Was there any evidence tending to prove this waiver? See *Murray's* proof. The receipt for the goods demonstrates the waiver. It was dated on the 29th, the goods were delivered to the plaintiff in the last *replevin*, on the 27th. *Boggs'* *replevin* issued on the 25th, *Powell & Fiddeman's* on the 26th, the plaintiffs' on the 27th. The defendants' on the 29th sign a receipt for a delivery of the goods to them. There was no delivery in fact. Then the receipt must be a waiver of the right to demand it. The receipt is demonstrative evidence of this. It is no answer to this that the appraisement was still to be had. It would not now be competent to these defendants to set up the want of an appraisement, having renounced that benefit by a surrender of the property. But with reference to these defendants the appraisement has been made.

Then as to the 11th instruction. There being two *reple-*

vins in fact by the receipt, *Boggs* in effect agreed to look to the bond in this case, instead of retaining the property, and vindicating his rights under the first writ. Having agreed for value not to set up the irregularity of the taking under the second writ, he cannot now insist on it. No great principle of public policy or morality is at stake here. The defendants were competent to surrender. They could have quashed their writ, and may waive the custody under it, and for the first time at the trial they are not competent to set it up as an answer to the plaintiffs' demand, and to the merits of the cause. At least the receipt is evidence of an intention to waive, and we are entitled to its protection.

The appellant's 3d point includes the 1st, 2d, 3d, and 7th instructions, and the additional instruction added to the plaintiffs' 2d prayer below, and the defendants' 3d prayer.

It is here material to remark, that *Boggs'* flour was sold for cash, and *Fiddeman's* corn on credit. Did *Boggs*, by delivery of the flour to *Tyson & Norris*, intend to vest the title in them? By a general delivery of goods upon a sale and nothing said, the title vests in the vendee. *Chapman & Schoolcraft vs. Lathorp*, 6 *Cowen*, 110. 6 *Pick.* 162.

Did the usage change the character of the question so as to make the court's act erroneous? There is no difference between the effect of a contract expressly or by usage, for cash. Independent of usage title is not vested, unless by delivery, it was so intended. Now, waiver or no waiver of the cash payment, with reference to title, is a question of fact to be settled by a reference to all the circumstances prior and subsequent to delivery, and not by delivery only. The usage does not prove that the cash payment may not be waived. The only effect of the usage is to rebut the inference arising from the delivery, and to show that title still remained in the vendor. The objection argued is, that finding the usage, then no intent to give credit existed, without any reference to other circumstances. The flour was bought for shipment, and the vendees known to be shippers. *Boggs* is silent. No act done to get back the property, and the proof is, that the

title is not to depend on the payment of the purchase money. See *Tyson's* evidence. If the title may be waived, and permitted to vest, notwithstanding the cash payment is not made, then the jury was the proper tribunal to determine whether the fact existed. Suppose a usage existed *Cui bono?* cannot the vendor contract without reference to it? Found or not found, the usage is immaterial, if the evidence shows as it does here, that he did not contract with reference to it.

Defendants' 4th prayer, and 4th, 5th, and 6th, of the court's instructions. Fraud or no fraud in the original purchase. What is the fraud which will vacate the contract of sale in personal property? Can it exist independent of design? or if when concluded, there is no intent to deceive? Such a sale is not tainted, because, in fact there was no deception. Fraud, of which the law will take cognizance, exists not, independent of a mental reservation to deceive. If the party intended to act fairly, no charge of fraud can be sustained in human contracts. *Conard vs. Nicoll*, 4 *P. S. C. R.* 295. To constitute fraud there must be contrivance and design to deprive a party of his rights. We are not to confound evidence of fraud, with the fraud itself. The evidence of contrivance with the contrivance itself. *Hickly vs. The Farmers and Merchants Bank*, 5 *Gill and John.* 377.

The evidence is clear, that an intent not to pay, did not exist at the time of the purchase, and the facilities enjoyed by *Tyson & Norris*, show that they had grounds of belief that they could pay. Checks on the *Union Bank*, and drafts on *Boston*, were a present means of payment, and hence the general insolvency of the house not material. If they intended by the shipment to pay for the purchase, no fraud in law or morals; and the court said if they intended to pay, no fraud. The jury have found they intended to comply. It is therefore a question of evidence. The expectation not to pay, is evidence of an intent to defraud, but mere expectation is not *per se* the fraud, but the intent; the design not to pay is the fraud which vacates the sale. An intent must depend on the mind of the party where it was lodged. Insolvency

per se is not conclusive evidence of fraud. But it is said it must not be concealed; it must be disclosed; that it was not disclosed, which is a fraud, as alleged. Mere silence on the subject of insolvency, without any intent on the part of the purchasers not to pay, would have satisfied the prayer. *Noble v. Adams*, 7 *Taunt.* 59. False pretences are necessary to constitute fraud to vacate a sale of goods. 1 *Gren.* 376.

Defendants' 5th point relates to 5th prayer. It supposes an actual possession of the property, or an advance on the faith of the shipment was necessary, to enable the plaintiffs to maintain *replevin.*

The account current proves that on the 25th of April, at the time of the transmission of the bill of lading, *Bradlee & Co.* had advanced $3,293 36. The last draft was on the 16th April; then came the advice by letter, that the draft was noted. *Tyson & Norris* reply, that they still expected the acceptance or payment of their draft, to sustain that expectation and induce *Bradlee & Co.* to accept, made the shipment per the *Joseph.*

As to *Tyson & Norris*, the actual shipment of the cargo put it out of their power to stop the goods in their transit to *Boston.* No other person could interfere but *Tyson & Norris*, and they only in the execution of that particular right. *Ryberg & Co. vs. Sneel*, 2 *Was. C. C.* 404. The acceptances by *Bradlee* were on the faith of shipments made and to be made, but if not so, *Tyson & Norris* acknowledged they had drawn too close; confessing that they shipped these goods to make that debt good. Then the effect of a shipment to pay an antecedent debt, is, that the right to stop *in transitu* is gone.

MAYER, for the appellees, contended:

That to nullify a cash sale for fraud in the vendee, there must be a design and intent not to pay. There was no fraud without a design to prejudice. In the common law sense of fraud you must find design to injure. *Earl of Bristol vs. Wilsmore & Page*, 8 *Serg. and Low.* 146. Cases resting on the policy of the law are decided on other grounds. It

is not sufficient to show a case of aggravated insolvency, nor how clearly the vendee may know his condition; yet if no intent to deceive, the property vests in the purchaser. Hopes spring from new contracts—new profits may discharge old debts. Experience demonstrates this. Many cases of desperate fortunes are restored by new operations of skill, sagacity, and enterprize. Men constantly raise themselves superior to ancient embarrassments. To vacate their contracts an intention to deceive must exist. And why should it not be so? A purchaser obtains an equivalent for the claim against him in what he buys; that furnishes him with the means of payment. Suppose a man begins the world without a dollar, he lays the foundation of future fortune in a purchase. Are his acts void, because of current liabilities for his subsistence? His dearth of means is not to avoid his contracts. Nothing is more unjust than to make conscious insolvency sufficient *per se* to nullify purchases. Such a principle would lead to the most pernicious consequences; but the law does look to the *bona fides* of the transaction. If his intentions are not dishonest, his contracts are valid, and may lift him above trouble. If intent must be found, and so are the cases, the principles ought not to be expanded. Here were well founded expectations of ability to retrieve affairs. Honest objects and expectations; intervening rules of a bank with which they previously traded stopped them. Expectations are equivalent to intentions; but if distinct, does it become necessary to prove both? The rules contended for on the other side would lead to confusion, Parties ought to look well to the situation of those they deal with, and the court below has not invaded the standard decisions on such subjects.

Actual possession is not necessary to maintain *trover*. Cases of special property have sustained it. *Fowler vs. Down*, 1 *Bos. and Pull.* 46. At common law actual delivery was not necessary to a purchase for value, or in discharge of a precedent debt.

Our recording laws admit that delivery of a chattel is not necessary to vest title in a purchaser.

The evidence shows that the defendants were joint trespassers; they were together; *Boggs* on board, *Fiddeman* took possession. The sheriff was excused. The use of process did more wrong; it was an abuse. They took all the plaintiffs were entitled to; and the argument now demands an apportionment of the wrong between *tort-fesors*. *Isley, et al vs. Stubbs*, 5 *Mass.* 283. The wrong always relates to the original taking, and its being done under color of the *replevin*, increases the wrong and trespass. Misjoinder here is merely matter in abatement.

In *replevin* the plaintiffs may recover part. There may be judgment as against one defendant for one part, and against another defendant for a different part. Defendants may sue for several parts. But here there was one original joint taking. Plaintiffs are not to be defeated for a misjoinder; they had had a right of election between the defendants.

McMahon, for the appellants, in reply.

I propose to consider:

1. Whether the plaintiffs in the *replevin* had any right.
2. The property of the defendants.
3. Was the writ properly served?
4. The question of delivery.
5. The fraud in the sale.

1. Has the plaintiff a title to maintain the action of *replevin*?

Replevin has taken the place of *trover*. It involves title to possession. Injury done to a possessory right. What is the character of the right set up by the plaintiffs?

Tyson & Norris were general owners; that is conceded. The title of factor is either for a general lien, or it is a special title in the goods. Factor, with a special property. 2 *Wm. Saund.* 47, (*a*) *note*. Mere possession will not maintain the action. A mere factor, without interest, cannot sue. The special property is a right to keep the goods for some purpose of the owner. A mere intent to vest property does *per se* vest it. It must be followed by actual or

constructive delivery. Either is sufficient. If the bill of lading was once in his possession, that symbolical delivery was sufficient. In this case the plaintiff had neither possession of the bill of lading, nor the property. There was a mere intention on the part of *Tyson & Norris* to give the plaintiffs the property. *Walter, et al vs. Ross, et al.* 2 *Wash. C. C.* 283, 290.

There was a constructive condition to perform an object never accomplished. See the correspondence. The title was not to vest, unless the bills were accepted. They were not accepted. Hence the title, the right remains. 3 *Pet. C. C. R.* 112. *Walter, et al vs. Ross, et al*, 2 *Wash.* 295, 296. *Ryberg, et al vs. Sneel*, 404. *Abbott. Ship.* 206, (*No.* 1.) *Hotchkiss vs. McVickar*, 12 *John.* 406, 407. Before bill of lading received how could *Bradlee* have disposed of the property? *Tyson & Norris'* general property remained; the special property never attached. *Coxe vs. Harden*, 4 *East.* 217. If the plaintiffs here got a right of lien for antecedent advances without acceptance, they get a right without any corresponding consideration or value.

2. The inquiry here is, where two took distinct parcels of property without any union or concert, can they be united in the same action?

Boggs went for his flour, takes it; never touches the corn. Why is he united with *Powell?* There was no joinder in the caption of the property. A mere *juxta-position* of the agents. This does not make joint trespassers. The prayer says there was no joinder, and if the jury so found the fact, then what is the law? The prayer assumes there was no joinder, and if the jury so found the fact, what is the conclusion of law? *Gould Plea.* 204, 209. *Sprague vs. Kneeland*, 12 *Wendell*, 164.

Where the joinder is good in law, and erroneous in fact, when is the objection to be taken? I contend it can only be taken on the evidence. When the proof is offered, the time has come to raise the objection. Then as to the form of taking the objection. Is it matter of election or not? How is the election to be exercised in a case where two are sued,

and you prove one cause of action against one, and another cause of action against another? Two cases in fact. Then who is to elect after the jury is sworn? Who is to be turned out? The right is in the plaintiff. Suppose he exercises it, and takes a verdict for the corn, and loses the cause as to the flour. What is the effect of that verdict? You cannot *non pros.* as to part. Suppose the plaintiff had declared on the fact. Demurrer would have defeated the suit. The plaintiff cannot proceed until he aids the defect, and dismisses his suit as to one.

MAYER, for the appellees, at this stage of the cause, said:

In answer to the objection of a misjoinder, that however it might apply to the plea of *non cepit*, it did not apply to the plea of property. *Replevin* was a proceeding in *rem* except as to the plea of *non cepit*. *Wilkinson on Rep.* 50. 6 *Law Lib.* 18. There was no judgment for a return on the plea of *non cepit*. It was only on pleas disaffirming the plaintiffs' right of property, that a return is awarded. The caption and detention, and question of property, are distinct. When property is not put in issue, although the defendant may succeed on the plea of *non cepit*, he is not necessarily entitled to the property. A return depends on the justice of the defence. The judgment is rendered according to the reason of the thing and justice of the claim, and is moulded accordingly.

Under the bill of lading and letters, it is denied that our property would not enable us to maintain the action. *Haille vs. Smith, et al*, 1 *Boss. & Pull.* 563. *Griffith vs. Ingledew*, 6 *Serg. and Raw.* 429. Although goods are at the risk of the consignor, still the right to recover possession of the goods is in the consignee. This is the effect of the bill of lading in the modern mercantile law. *Morrison vs. Gray*, 9 *Serg. and Low.* 405. 3 *Camp. N. P.* 6 *Bac. Ab.* 73.

MCMAHON, for the appellants, resumed the reply.

3. Was the writ properly served? and in connection the defendant was entitled to his prayer, and the instruction as given on this head was erroneous.

The time of the agreement was considered doubtful, and the prayers presumed:

1. As if the agreement was made after the delivery.

2. As if made prior to the delivery.

Then under the first view, if the goods were in the custody of the law, the *replevin* was not maintainable.

Then on the supposition that the agreement was made after the service of the writ. The court below, seemed to have admitted that if there were no agreement, *a priori*, the action was gone. If that is the law, have the court below granted our prayer as they ought to have done? Is it covered by the instructions? In such a case the instruction ought expressly to cover the ground of the rejected prayer, and not leave it to inference. See 10th and 11th instructions.

The object of that principle which declares that goods in the custody of the law shall be held sacred, is to prevent all interference with the possession—"all hands off"—until the office of the law has been performed, as to the process under which it was taken. In this cause the writ is to seize property—appraise it—place that on record as evidence of the valuation. Then the property is to be delivered over to the plaintiff. This is the public policy, and none can interfere with it. It is for the benefit of plaintiff and defendant. Then can one party waive the exactions of duty in which the other is interested? As to an appraisement for the defendant, the plaintiff cannot waive it. The new *replevin* let the old action go on. Dispensing with the appraisement, the defendant might remain remediless as to the value. Many practical disadvantages readily present themselves for illustration.

As a general rule it cannot be contended, that the plaintiffs and the officer may agree to waive the duty of the officer. The counsel feeling this, put *Tyson & Norris* on the ground of co-labourers with the plaintiffs—as abandoning the property to them by the plaintiffs.

The office of the writ can only be waived by the agreement of *both* parties, and which must be at the time of service, and a subsequent agreement will not avail here as it

leaves the property in the custody of the law, at the period of the execution of this writ.

Then as to the *corn*. *Wilson*, the sheriff, executing the *replevin* of the corn, made no agreement. *Murray* made one as to the flour. *Boggs* had no power over the corn which was in custody at the time of the service of the 2d *replevin*. Is the custody as to the corn waived, and how? The act of waiver it is contended, is in the written receipt. The whole act is in writing. The paper is the evidence of the waiver, and the court, by the 11th instruction, have put the construction of the paper to the jury. This was error. The construction of the receipt was for the court, who should have determined what the signers intended by it. It was for the court to say, waiver or no waiver.

Under what circumstances do the court say it may operate as a waiver? If combined with *parol* evidence, that with the paper, might be left to the jury. But in such case the court should have instructed the jury what circumstances were necessary to constitute the receipt a waiver; the preliminary facts on proof of which the paper might operate as a waiver. The knowledge of *Boggs'* flour being receipted for, could have no influence on the rights of the other parties. The evidence is not put on the ground of an agreement made for *Powell* and confirmed by him, but because another made an agreement and *Powell* knew it, it is inferred that *Powell* designed to waive his right. When an irregularity of procedure is to be waived, it should be known, and the waiver predicated on it. Here, then, is no evidence that *Powell* knew there was irregularity. The receipt and parol agreement were made with *Boggs*, it has no reference to any irregularity; the agreement might or might not apply to that; the jury, therefore, should have been instructed to find the knowledge of *Powell* of this irregularity. Waiver is an intentional act, founded on intent, as that a party made a *waif* of his right. He knew he had it—threw it away—no such fact put to the jury.

The service of a writ on property in the custody of the law, is a nullity; it is a void act, and so the court will ever re-

gard it. 3 *Chitty Prac.* 522. An irregularity may be waived; a void act cannot be waived. A nullity is some essential defect in procedure. Where the law has prohibited an act, it is an essential defect to proceed against it. A step in a cause, inconsistent with the idea of antecedent proceedings, being a nullity, is no waiver of objection of that ground where it exists.

What is of the essence of waiver? Implied waiver is an act done inconsistent with that which is insisted on as an objection. The objection is, that the corn was in the custody of the law, because it was *not* delivered to *Powell.* There is merely a receipt for the corn on the 29th April. This is no waiver of the misconduct of the plaintiff in suing forth his writ on the 26th April. At least the receipt is an equivocal act, and to make it operate as a waiver, the plaintiffs who relied on it in that character, should have furnished the additional proof.

Upon the question of fraud, I contend, that an assignee will be regarded as the vendee, except where the former has given value. Where the property fraudulently acquired is surrendered in payment of a precedent debt, it will not avail the assignee as against the injured party. *Root vs. French,* 13 *Wend.* 570.

In such inquiries nice questions of insolvency ought not to be entertained; but a man engaged in business, known to himself to be insolvent, to such a degree that the vendor would not trust him, does commit a fraud in purchasing for cash. If non-payment is the sole fraud, the intent to pay may give the rule; but such intent is not the sole fraud. It is not the only evidence in this case.

In a contract of sale, as between vendor and vendee, good faith must be observed in the making.

Whatever good faith requires to be disclosed, is as objectionable in law and morals when not disclosed, as to mislead.

The exceptions are, where the grounds of knowledge are equally to both parties, what is called the judgment of the quality of an article purchased.

Would knowledge of insolvency be likely to influence parties in making contracts? Is it material? Is there no obligation to disclose a fact which would prevent the contract? Concealment is wilful withholding. If a party misrepresents, the courts will vacate his acts. Fraud is the suppression of truth. What honesty demands is to be disclosed; non-disclosure is suppression. The decisions have not shut out these principles, and commercial policy cannot sanction opposite doctrines. *Chapman & Schoolcraft vs. Lathorp*, 6 *Cowen*, 116, 117. *Lupin, et al vs. Marie*, 2 *Paige*, 172.

The instruction of the court below looks to the *non-intent* to pay at the formation of the contract, as the only ground of fraud. I deny this principle. The meditation to defraud, is not always necessarily material. Consequences which are fraudulent, are sufficient to vacate; they work a fraud independent of intention, as where an insolvent, without any reasonable hope to pay, contracts. Will any one say that is not void? He has not a plank to swim on; no reasonable expectation to pay. Reliance on friends will not do. In such a case his intent is not material; from his position as purchaser, he practised a fraud. *Hawse vs. Crowe*, 21 *Serg. and Low.* 477. *Noble vs. Adams*, 7 *Taunt.* 61. 17 *Serg. and Low.* 290. He is bound to disclose; non-payment is the necessary result of his act, which is a fraud.

The instruction has a tendency to mislead the jury; it left open that both the want of means, and the intent to defraud must be found. It has been put as if the want of means was not evidence of intention. The insolvency was established before the delivery of the goods. I consider the distinctions between fixed design, and a spirit of reckless adventure futile and ridiculous; that the purchases of both are equally unlawful and fraudulent.

Then again, is the deposite of the bill of lading in the post office at *Baltimore*, a delivery to the consignee at *Boston*? If we admit that, if the bill of lading had been received by the consignees, the question still recurs, would that have conferred title? *Morrison vs. Gray and another*, 9 *Serg. and Low.* 405,

is an authority for the appellants. The bill of lading in its transit, is not more efficacious than the goods in their transit. The representative, the bill of lading, is not more effective than its principal, the goods. It is at most but a constructive delivery. Then can a factor, constructively in possession, of what is constructively his, bring his action of *replevin* for property, constructively delivered to the defendant? It seems to me not.

STEPHEN, J. delivered the opinion of the court :

This case involves several questions, some of which are of considerable importance, and the decision of which is attended with no little difficulty. It is an action of *replevin*, instituted in the court below, by the appellees against the appellants, to recover a quantity of corn and flour, which had been sold by separate and distinct contracts by the appellants to certain persons, from whom the appellees claim to have derived title. We do not think that the county court were wrong in rejecting the defendants' first prayer. The principle is unquestionable, that property while in the custody of the law cannot be *replevied ;* and the reason is, that the law will not be so inconsistent with itself, as to be auxiliary or lend its aid to an act which would operate to defeat its own purposes. But the court were called upon to instruct the jury, that if they found that the writ of *replevin* which issued in this case, was executed before the service of the first *replevin* upon the same property, and while it was in the custody of the sheriff, then the plaintiff was not entitled to recover. There being evidence in the cause to go to the jury, to prove a waiver on the part of the plaintiffs in the original *replevin*, of the delivery of possession to them, under their writ against the defendants in that action, the court would have erred in giving a positive instruction to the jury, in the manner required by the defendants' *first* prayer.

We think that the court below did not err in refusing to grant the defendants' *second* prayer to the extent to which they were asked to instruct the jury ; that is to say, that the plain-

tiffs could not recover at all in that suit, upon the state of facts assumed by the prayer, and upon which it was predicated.

Without deciding whether two defendants can be sued jointly in one action of *replevin*, for several parcels of property, severally owned and separately taken and detained, we think that such a misjoinder (if it be one) would not have warranted the instruction asked from the court, because such an objection is not altogether fatal to the action; but the defect may be cured by putting the party to his election, as was done in 2 *Johns. Rep.* 228. And we find also, that a misjoinder of counts in a declaration, may not only be cured by an exercise of the right of election, but also by the verdict of the jury finding for a plaintiff on one count, and for the defendant on the other; as where an action is brought against a defendant in his personal, and also in his representative capacity, which would be a misjoinder of counts; the defect may be cured by verdict. *Gould Plea.* 217.

The court, we think, were also right in rejecting the defendants' *third* prayer, because there being evidence in the cause of usage to deliver the flour when sold for cash, without demanding the cash at the time of delivery, the instruction asked for by the defendants' prayer, that no property passed on the delivery unless the cash was paid or tendered at that time, was properly rejected by the court, as such an instruction would have withdrawn from the jury the consideration of such usage, and the effect of it upon the contract in this case, as to the necessity of making such payment simultaneously with the delivery of the flour purchased.

We do not think that the court erred in refusing the *fourth* prayer of the defendants, relative to the insolvency of *Tyson & Norris*, at the time they made the purchases of the flour and corn in this case. The prayer seems to have been founded on the idea, that the sale was fraudulent if the vendees knew themselves to be insolvent at the time of the purchase, and did not communicate that circumstance to the vendors; knowing at the time that they were ignorant of the fact, and had not the means of becoming acquainted with it. The law, it

seems, does not sanction such an elevated tone of morality in mercantile dealings, as would have warranted the granting of the prayer, to the extent asked for by the defendants in this case. Such a strict and rigid doctrine, considering the vicissitudes and changes incident to mercantile life, would go far to cramp the operations of trade and commerce, and has not received the countenance of the courts of justice, either in this state or elsewhere, as far as we have been able to ascertain. Moreover, the proceeds of sales of the property purchased, might have enabled them to fulfil their contract, and from any thing which appears might have been intended to be applied to that purpose.

Nor do we think that the court erred in refusing to grant the *fifth* prayer of the defendants. By the terms of the bill of lading, the property was to be delivered to *Josiah Bradlee & Co.* or to their assigns, he or they paying freight for the same. This we think vested the legal title in them, and enabled them to maintain the present suit. "If goods by a bill of lading are consigned to A, he is the owner, and must bring the action if they are lost; but if the bill be special to be delivered to A, for the use of B, B ought to bring the action." 2 *Liver. on Agen.* 117, and the cases there cited. In 6 *Serg. and Raw. Tilghman*, Ch. J. says, "in deciding on the legal property, the court will look to the face of the bill of lading; but in ascertaining the equitable owner, the invoices, letters of advice, and other collateral evidence, will be resorted to."

For reasons already given, we think the court did not err in refusing to grant the defendants' *sixth* prayer, to the full extent to which they were asked to go in their instruction to the jury.

We think the court were right in refusing to grant the defendants' *seventh* prayer, because there was evidence to go to the jury, from which they might have found a waiver of actual delivery by the plaintiffs in the original *replevin*, and the granting of the instruction by the court, might have tended to mislead the jury as to their right to make such deduction.

We think the court were also right in refusing the defen-

dants' *eighth* prayer, because there was evidence to go to the jury, from which they might have found a waiver of the delivery of the corn before the service of the writ of *replevin* issued in this case.

We think the court below were also right in refusing the defendants' *ninth* prayer, for the reasons we have already assigned in a preceding part of this opinion. The misjoinder of the causes of action, if it was one, did not go *totally* to defeat the action, and therefore did not warrant the prayer to the full extent in which it was made.

For the same reason, we think the court below committed no error in refusing to grant the defendants' *tenth* prayer.

After refusing the defendants' prayers, the court delivered several instructions to the jury, the accuracy of which is brought before this court for revision, and which will now be considered and decided upon.

We fully concur with the court below in their *first* instruction to the jury. Although the sale of the goods was for cash, yet it was competent for the vendors to waive the cash payment by an unconditional delivery of the goods, without a concurrent demand of the money at the time the delivery was made. They had a clear right to dispense with the cash payment, and it was unquestionably waived by an unconditional delivery, unaffected by any fraud on the part of the purchaser in obtaining it. In such a case, the condition of payment simultaneously to be made according to the contract, would be waived, and the right of property would pass.

We can perceive in the *second* instruction of the court to the jury no error, except that they have withdrawn from the jury the decision of the question of fraud in the *purchase* of the property. This was no doubt inadvertently done, as their attention was very properly drawn to the consideration and decision of that fact in the previous instruction.

It does not appear that the court have committed any error in their *third* instruction to the jury. The court rightly left it to the jury to find the fact of usage, and to decide whether the vendors of the articles acted in reference to it at the time

of the delivery, so as to prevent the delivery, if made unconditionally, from operating as a waiver of the cash payment. If the delivery was unconditional, and without reference to the usage, the title passed. If it was made with reference to the usage, which was a question of intention, then the title did not pass, if the cash was not paid when thereafter demanded.

In making the delivery, it was unquestionably competent for the vendors to waive the saving operation of the usage upon their rights; and to transfer the title by an unconditional delivery if they thought proper to do so.

We concur with the court below in their *fourth* instruction to the jury, as to the invalidity of the contract upon the ground of fraud, upon the hypothesis that the jury should find the facts therein stated, to be true; but we think they erred, in telling the jury that the plaintiffs would, nevertheless, acquire a good title by the bill of lading, if they became creditors subsequent to the delivery of the goods to *Tyson & Norris*, (of which fact there was not a particle of proof,) and without adding that they became such creditors, *bona fide*, upon the faith of the consignment and shipment of those very goods. Upon no other grounds could they acquire a right, when none passed to the persons under whom they claimed. In such a case, good faith, and a valuable consideration, would be essential constituents of a good title in any person claiming under them.

We think the court erred in the *fifth* instruction given by them to the jury, in directing the jury, that *before* they could find the sale of said goods fraudulent and void, they must find that *Tyson & Norris* knew that they were not able to pay for the goods, and that they would not be able to pay for them, and neither intended nor expected to pay for them. The jury could not well find that *Tyson & Norris* knew that they would not be able to pay; it was sufficient for the jury to find, in that respect, that they knew themselves to be insolvent, and had no reasonable expectation of paying for the goods purchased. The necessary tendency of such an in-

struction was calculated to bewilder, embarrass, and mislead the jury in their deliberations, and was therefore erroneous. In 21 *Serg. and Low.* 477, the above principle seems to be decided. In that case, a vendee, under terms to pay for goods on delivery, obtained possession of them by giving a check which was afterwards dishonoured, and the court held, that he gained no property in the goods, if at the time of giving the check, he had no reasonable ground to expect that it would be paid. The transaction would be fraudulent, and the property would not pass.

For the reasons already given, we think the court below were right in their *sixth* instruction to the jury.

We think the court below erred in their *seventh* instruction to the jury, by requiring them, before they found against the plaintiffs, to find that the plaintiffs never made to *Tyson & Norris* any advances, nor contracted for them any responsibilities upon the faith of said consignment, when there was no evidence in the cause upon which the jury could find such a fact. Such an instruction was erroneous, as tending to mislead the jury in the formation of their verdict.

For similar reasons, we think the court erred in their *eighth* instruction to the jury, by requiring them to find that certain facts did not exist, of which there was no evidence, before they could find a verdict against the plaintiffs, and that they had no right to recover. Such instruction was calculated to mislead the jury, and was therefore erroneous. There was no evidence in the cause of any advances made, or responsibilities incurred by the plaintiffs for *Tyson & Norris* on account of said corn or flour.

We can perceive no error in the *ninth* instruction. If the goods were sold on credit, and not for cash, and were delivered to the purchasers in the absence of fraud, there can be no doubt that the property passed from the vendors to the vendees, and the plaintiffs would be entitled to recover.

The *tenth* instruction we think was also correct. It was no doubt competent for the *Boggs*, one of the defendants, to make the agreement, dispensing with the actual delivery of

the goods for which the writ of *replevin* issued, so as to legalize the execution of the process of *replevin*, then in the hands of the sheriff, and which he was about to execute for the plaintiffs in this suit. If he did make such an agreement for that purpose, he would be precluded by it from raising the objection, that the goods were in the custody of the law, on the ground that such an objection, thereafter, would be fraudulent, and a violation of fair dealing and good faith.

We cannot, however, concur with the court below, in their *eleventh* instruction, which does not stand upon grounds equally tenable with those contained in the next preceding instruction. There was no agreement to be found by the jury, dispensing with the delivery of the corn, for the purpose of enabling the officer to execute the writ of *replevin* then in his hands, previously to the execution of that writ; and the objection, that the goods were in the custody of the law when the writ of *replevin* was executed, might well have been made, without any violation of good faith, even if the hypothetical statement of facts contained in the court's instruction had been found by the jury to have existed. The subsequent ratification of the act of the officer in making the *replevin*, if found by the jury, would have been purely voluntary, and being founded upon no valid consideration, was not obligatory upon the defendants.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

JOHN D. GROVE *vs.* WILLIAM H. FRESH.—*December*, 1837.

Under the act of 1820, ch. 161, upon a bill filed on the 23d of June, 1835, if the *subpœna* is returned served to the then ensuing July term, and the defendant does not appear, an interlocutory decree may pass against him, and an *ex parte* commission issue to prove the allegations of the bill.

Upon the return of the commission, the bill is not to be taken *pro confesso* against such defendant; though if there be also a non-resident defendant, against whom an order of publication has been passed, it is indispensable

to a final decree that the bill should be taken *pro confesso*, as against the latter, the proof under the commission not being binding upon him.

Multifariousness in a bill must be taken advantage of by demurrer, and it is no excuse for not having presented the objection in that form, that the defendant had not appeared in court at the proper time, after having been summoned to do so.

The copy of a contract between private persons and the Chesapeake and Ohio Canal Company, is not evidence, though signed by its clerk, and though the company upon application refuse to suffer the parties interested to have the original to return under the commission.

A decree which directs the payment of money, without actual or constructive proof of its receipt by the party directed to pay it, or of its loss by his negligence or misconduct, is erroneous.

And where it was shown that the defendant had received a certificate of debt from the Canal Company, in December, 1833, or January, 1834, and the bill which assumed its payment to him was filed in June, 1835, it was held to be too short a time to make the presumption, so as to charge him personally.

Upon a bill for an account, filed by one partner against his co-partners, after the termination of the partnership, all the parties are regarded as actors, and the decree must settle the partnership concerns as if each partner was a complainant, filing a bill against his co-partners.

The claims of the complainants and the defendants, and of the defendants, *inter se*, must all be determined.

Quere.—Whether a decree would be reversed, which merely settles the rights of the complainant and defendants, when the latter had not appeared in the Court of Chancery before the decree, and consequently filed no exceptions to the accounts of the auditor, upon which the decree was based.

APPEAL from *Chancery*.

On the 23d of June, 1835, *William H. Fresh* filed his bill in Chancery, alleging that he, with a certain *John Stocksdale*, entered into a partnership, for the purpose of obtaining a contract and constructing a section of the *Chesapeake and Ohio Canal*; that a contract was accordingly entered into between *Stocksdale* in his own name, and the Canal Company, for the construction of the 147th section thereof; it being agreed between the appellant and appellee that *Fresh* should be considered a dormant partner; that soon after the contract was entered into, the parties agreed to take in another partner, a certain *Joseph Ward*, who became a member of the partnership; and that they all carried on the work for their joint benefit, under the name, however, of *Stocksdale* and *Ward* only;

that after they had been some time engaged, *Stocksdale* sold all his interest in the concern to *John D. Grove*, with the consent of the appellee and his partner, *Ward;* and that they by an arrangement with the company, and all the other parties concerned, put *Grove* in the place of *Stocksdale*. The bill then alleged, that the section was completed by the appellant and appellee and said *Ward;* that as the work progressed, *Grove* from time to time received therefor large sums of money from the Canal Company, which were paid to him as the contractor with the company, for the benefit of the partnership; that besides the said sums, there was on final settlement between the company and the said *Grove*, found due to the said section $2,711 68, and that a certificate, dated in January, 1834, was issued by the said company for the above sum, with interest, to the said *Grove;* that the money in the said certificate has been received by the said *Grove*, and appropriated to his own use; and that he has also converted to his own use certain personal property of the partnership, enumerated in the bill, and that complainant furnished materials in the business of the partnership, for which he has not been allowed; that a settlement was asked of *Grove*, which he refused to enter into with complainant. Prayer for a discovery of the partnership effects, and an account; for a *subpœna* against *John D. Grove*, and an order of publication against *Ward*, who was a non-resident, and for general relief.

A *subpœna* accordingly issued for *Grove*, and an order of publication was passed against *Ward*.

On the 5th August, 1835, and at the July term of the Chancery Court, *Grove* having been returned summoned, the usual decree was passed as against him, declaring that the complainant was entitled to relief, and ordering a commission to take proof, for the purpose of showing its extent. On the same day a commission was issued, proof was taken, the substance of which sufficiently appears in the opinion of this court. Proof was offered of the contract between the Canal Company and *Stocksdale*. The cause was then referred to the auditor, who reported two accounts, one against the ap-

pellant in favor of the appellee, for a balance of $1,153 41, and the other against *Ward*, also in favor of the appellee, for $190 72. The former account assumed upon the proof of *Lorenzo Ambrose*, taken under the commission, that *Grove* was liable, as having received the sum due on the final settlement of January, 1834, from the Canal Company.

At December term, 1835, the Chancellor (*Bland*) decreed that the bill of complainant should be taken *pro confesso;* that the report of the auditor should be confirmed; and that the defendants should respectively pay the complainant, or bring into court, the sums reported to be due by the auditor, with costs.

From this decree *Grove* appealed.

The cause was submitted on the written arguments of the solicitors for both parties, to Buchanan, Ch. J. Stephen, Archer, Dorsey, and Chambers, Judges.

Price, for the appellant.

The whole case below, from beginning to end, having been proceeded in, heard, tried, and determined, in the absence of *Grove*, the court will require the complainant to make out his case according to strict law. It will take nothing for granted in his favour. No answer being filed, there was no issue in the case, and nothing therefore can be supplied by intendment, or by legal admission, on the record.

My first objection is, that these proceedings were a little too summary.

By the act of 1820, ch. 161, sec. 1, when a *subpœna* is returned, summoned, against a defendant, who shall fail to appear according to the exigency of the writ, the court may enter an interlocutory decree, and issue a commission for taking testimony to support the allegations of the bill, and upon the return of the commission, the court shall proceed to a final decree in the cause in the same manner as if the defendant had appeared and put in his answer.

By the 2d section, whenever such bill shall charge any

matter, as being within the private knowledge of the defendant, and shall pray a discovery on oath, as to such matter, and the plaintiff shall satisfy the court, on oath, taken in open court, that such matter does rest in the private knowledge of the defendant, and there is reasonable grounds to believe that such matter does exist, the court may take the bill *pro confesso*, and proceed to a final decree.

By the act of 1832, ch. 302, sec. 3, when a defendant, of full age, shall be returned *non est* upon *two successive subpœnas*, the court may order publication of the substance of the bill against the defendant, as if he were a *non-resident*, and as if the case made in the bill were within the acts relating to non-residents, provided that each of said *subpœnas* were delivered to the sheriff, or other officer, at least twenty days before the time to which such *subpœna* was returnable.

Now the question is, what did the legislature intend by the act of 1820? Did they intend, that no matter how short a period before the return day, a *subpœna* may be issued, or be served upon the defendant, if he fail to appear *at* the return, a commission may go out *instanter*, and upon its return, in one hour thereafter, a final decree may be passed, and the defendant be precluded forever from making any defence? Or did they intend that he should have a reasonable opportunity of being heard?

In this case, as we have seen, the bill was filed on the 23d of June, and on the 5th of July following, an interlocutory decree was passed, reciting that *Grove* had been summoned and had failed to appear. The whole interval between the filing of the bill and the date of the decree, is twelve days. Supposing the *subpœna* to have been mailed the day after the bill was filed, it would then take it two days, or it might be three, according to the course of the mail, to reach *Hagerstown*. Then it might be a week before the sheriff found it convenient to seek out *Grove* and serve the writ. Thus, from eight to ten days were almost necessarily consumed before the defendant could have had notice that a suit had been instituted against him. *Grove* then had from two to

four days at most, within which to ascertain what the suit was about—to employ counsel—and for that counsel to appear. And here it will be remembered, that the suit was brought in a court situated one hundred and ten miles from the residence of the defendant. If, therefore, the time given in this case, be considered reasonable, then, one hour would be as good as the whole time allowed him.

But the legislature have given an explanation of their intention on this point, by the act of 1832, above referred to. By that act a defendant cannot be rendered liable to a decree by publication against him, until two *non ests*, which necessarily require *two terms*, and each *subpœna* is required to be in the hands of the officer, at least twenty days previous to each return day. Having provided these guards against surprise by the act of 1832, can it be possible, that by the act of 1820, which merely provides a different mode of doing the same thing, it could be intended, that a final decree might be had against a citizen, before he could by any diligence, secure an appearance, or file his answer?

If the rules of the court of Chancery do warrant such proceedings, those rules are against the spirit of the act of 1820, and ought to be reformed. With such rules to work with, it would be the easiest thing imaginable, so to contrive matters, as in every case to deprive a party of his defence. I do not, however, intend to intimate the possibility of any such contrivance in this particular case.

2d Objection.—By the decree of the chancellor it is adjudged and decreed, that the bill be taken *pro confesso*. This is wrong. By the act of 1820, ch. 161, sec. 1, already referred to, the chancellor is authorized, upon the return of the *ex parte* commission, to proceed to a final decree in the cause, *in the same manner as if the defendant had appeared and put in his answer*. Now a bill is never taken *pro confesso* when the party has answered. The 2d section of the above act, provides that in certain particular cases under that law, the bill may be taken *pro confesso*, but this is not one of those cases.

In reply to this objection it may be said, that admitting the objection to be valid, it does not alter the result. But I have a right in a case like this, to insist upon all the forms. Admitting the chancellor's right to hang *Grove*, I only insist that he shall not drown him.

3d Objection.—The bill is vicious and demurrable for multifariousness. The bill is professedly filed by one person against two others, all of whom had been partners, for the purpose of having an account of the partnership transactions. In such a case the chancellor has an undoubted jurisdiction; but the bill, after stating in what manner the two defendants wrongfully applied the partnership assets to their own use, proceeds to allege, that *Grove*, one of the defendants, "did also convert to his own use a horse and cart which belonged to your orator alone." And this same horse and cart are made an item of charge in the auditor's account, thus, "To one sorrel horse and cart, the property of *Fresh*, taken by *Grove* and converted to his own use, $85." Whereupon, the chancellor passes his decree for the whole, including the horse and cart.

Upon this point, I refer to the following authorities: 2*d Red. Tr. Pl.* 181, *and note* (*b*) *ibid. Brookes vs. Ld. Whitworth*, 1 *Mad. Rep.* 86, 88, *and note* (*d*) *ibid. Salvidge vs. Hyde*, 5 *Mad.* 138. *S. C. on Appeal*, 1 *Jac. Rep.* 151.

In *Salvidge and Hyde*, 1 *Jac. Rep.* 151, a bill for an account of a testator's estate, and also to set aside sales made by the executor and trustee to himself, and to another person, held multifarious.

In *Brooks vs. Ld. Whitworth*, 1 *Mad. Rep.* 86, the bill was against several distinct purchasers and others, and held multifarious.

In *Cooper's Eq. Pl.* 182, it is said, "that the court will not permit several plaintiffs to demand by one bill, several matters perfectly distinct; nor one plaintiff to demand several matters of distinct natures against several defendants." Again, 183, *ibid*, "even when joint and separate demands were joined in one bill, a demurrer was allowed."

In *Davoe vs. Fanning*, 4 *John. Ch. Rep.* 199, the attempt was to blend together a demand by the plaintiff as legatee, against the defendant as executor, with a demand of the plaintiff in his private capacity, against the defendant in his individual character; and the bill was dismissed with costs. See what the chancellor says in the same case, p. 204. The last is this case exactly.

It may be urged that the objection to a bill for multifariousness, must be taken advantage of by demurrer, and cannot be made at the hearing. The law thus stated is admitted, but in this case the defendant having been deprived of the opportunity of making any defence, cannot be held to have waived this or any other objection. If a defendant submits to answer a bill on its merits, he is very properly held to have waived all objections which go merely to the form of proceeding, but in the absence of any defence whatever, there can be no waiver.

4th Objection.—The contract between *Stocksdale* and the Canal Company, if any such there be, is not established by legal proof. It is attempted to be established by exhibiting a paper, purporting to be a copy of such contract, signed by *John P. Ingle*, clerk, &c. and then by adducing two witnesses, who, *looking at the copy*, say it is a true copy. The points under this objection are,

1. That the original ought to have been produced. See *Gurley's Eq. Ev.* 100.

2. The original ought to have been produced, and when produced ought to have been proved, there being no express or implied admission of its execution under interrogatories in the common form, viz. "Look upon the paper writing here shown you at this, the time of your examination, marked with the letter A, was the same, at any and what time, signed, sealed and delivered by any, or what person or persons, in your presence." See *Gurley's Eq. Ev.* 98.

3. The copy here adduced is a mere nullity. The law on this subject is well stated in *Gurley's Eq. Ev.* 106, 107, from which I make the following extracts:

"When an officer is especially authorized to make out copies, not by the law, but by the court, these are the common office-copies of which so constant an use is made in equity. In all courts they are admitted for convenience, in the cause to which they belong, and are in fact, so far, equivalent to the record itself."

Here I remark, that this doctrine is given in relation to a judicial record, when if the original is produced it proves itself, and does not require any additional proof, as in case of a deed, of its execution.

Again: "If a person in an official situation makes out a copy and signs it, without having any especial authority to do so, there is no advantage whatever gained; he must appear and swear to it like any other individual."

Again: "If no exemplification or properly authenticated copy has been procured, *a copy sworn to have been examined with the original*, is admitted in proof of a record. Here, as in proving statutes, the witness must swear that he has either compared it line by line, or that he has looked over it while the original was being read aloud."

It will be seen by reference to the charter of the Canal Company, (*act of* 1824, *chap.* 79, *sec.* 3, 4,) that the powers and duties of the clerk of that company are not specified. The 4th section merely gives power to the president and directors to appoint a clerk.

There is nothing said in *Gurley's* treatise of the admission of copies of private documents; from which it may be inferred, that such mode of proof is inadmissible. See page 118.

For these reasons I hope the decree will be reversed, and the defendant admitted in the court below, to make his defence.

Dulany, for the appellee:

The first objection urged to the decree of the chancellor, in the above argument, is, that under the true construction of the act of 1820, ch. 161, sec. 1, the proceedings in the Chancery Court were too summary, and hurried on with illegal precipitancy.

The facts stated as the ground-work of this objection, are, that the bill was filed on the 23d of June, 1835, and on the 5th of July following the interlocutory decree was passed. The answer to this objection is, that in *point of fact* there is no ground for it. The interlocutory decree was made not on the 5th of July, but on the 5th of August, if the copy of my record which is now before me is correct, and I think it is; for the commission, which the record says was issued on the same day, is dated on the 5th of August. See record, pages 7 and 8.

If then the whole case was tried and determined in the absence of *Grove*, that absence was wilful, and continued after full notice and ample opportunity to appear and be heard, if, indeed, he had any thing to urge in his own defence.

But even if the facts were such as have been supposed, the interlocutory decree of the chancellor would have been fairly warranted by the act of 1820, the 1st section of which provides, among other things, that when the *subpœna* shall be "duly returned summoned," and the defendant "shall fail to appear according to the exigencies of the writ, or having appeared, shall fail to answer," &c. then the chancellor is not only "authorized," but "required," on application made to him, to enter an interlocutory decree, and issue a commission *ex parte*, &c. These words of the statute are too clear to admit of doubt. The time when the interlocutory decree is required to be passed by the chancellor, is expressly declared to be, when the defendant shall fail to *appear* according to the exigency of the writ; then, and upon that default, if applied to, the chancellor cannot choose, but is constrained to act by the imperative terms of the law; there is no obscurity to be illustrated by a reference to other laws, especially to the act of 1832, ch. 302, sec. 3, which has a very different object in view, from the law of 1820. The 3d section of the act of 1832, was intended to afford the same means of bringing persons before the court who are citizens of the state, but actually out of the state, as was before usually had against all non-residents; hence it directs that upon the return of "*non est*"

on two successive *subpœnas*, it shall be lawful for the court to order publication of the substance of the bill, &c.; the object of which is, to give *notice* to the defendant that he may appear. How different is the 1st section of the act of 1820, which in the provision of it now under discussion, pre-supposes not only that the defendant had notice, but that he was duly returned summoned, and wilfully refused to obey the commands of the court; and for this default, and as soon as it occurs, the defendant renders himself obnoxious to an interlocutory decree; and such exactly was the predicament of *Grove*, had been duly returned summoned, and had failed to appear in obedience to the writ; an interlocutory decree was entered against him, a commission issued, testimony was taken under it, and a decree finally passed on the 1st December, 1835. What just reason has *Grove* to complain of the precipitancy of these proceedings, when he might, at any time between the 10th July and the 1st December, have appeared and been fully heard in his defence.

The 2d objection is urged against the final decree, on the supposition that it takes the bill "*pro confesso.*" It is true, that the decree does take the bill "*pro confesso*" in terms, but it does not disregard the evidence returned with the commission; on the contrary, it is founded on the consideration of the evidence. It recites that the chancellor had considered all the proceedings, of which the testimony was a part; it also ratifies the report of the auditor, which is professedly grounded upon the proof taken in the cause, and which is of a character amply sufficient to sustain the decree itself. So that the same, and no more effect, has been given to the testimony than if the defendant had appeared and put in his answer. The adjudication then, in the decree, that the bill should be taken "*pro confesso,*" are mere words of form, inasmuch as the allegations of the bill have been all substantiated by proof, and the case actually decided by the chancellor upon its merits.

But if the objection should prevail, the court I apprehend will go no farther than to reform the decree, by striking out

the objectionable part of it, and then proceed to pass such a decree, in form and substance, as the chancellor ought to have passed. For I cannot agree with the counsel for the appellant, that his client will be entitled to have a total reversal and entire opening of the decree, because the case was tried below in *his absence*, for that was his own default, which surely cannot entitle him to peculiar favour.

The 3d objection of the appellant is made to the multifariousness of the bill.

Without admitting the truth of this objection, which it is not necessary to discuss, it cannot now prevail, for it comes too late, and advantage could only be taken of it by demurrer, before answer, and not at the hearing. This is admitted in the argument of the appellant; but it is said in this case there was no answer. It is urged that "the defendant having been *deprived* of making any defence, cannot be held to have waived this, or any other objection."

The error of this argument consists in assuming as a fact, that *Grove* was *deprived* of making his defence. On the contrary, every opportunity was afforded him for that purpose; he was summoned, and refused and neglected to appear; that he did not make a defence, therefore, was no *deprivation*, it was an act of choice, and at the same time an act of disobedience to the court. Can he obtain by this contemptuous conduct the advantage of urging an objection of a formal character at this time, which would not have belonged to him if he had regularly appeared and answered. General principles certainly forbid that a defendant should be thus favoured, as the consequence of his negligence and misconduct. Besides the act of 1820, in the 1st section of it, which contemplates a decree against a defendant who had not appeared or answered, gives to that decree the same effect as if he had regularly appeared and answered. It appears to me then entirely clear, that *Grove* cannot look behind the decree, which has the same effect against him as if he had put in his answer, to bring forward his objection to the multifariousness of the bill, if indeed it be multifarious; for this would be *in effect* to take the

objection *after* answer, which it is admitted on all hands could not be done.

5th section of the act of 1832, ch. 302, also forbids any decision upon the insufficient averments of the bill to which exceptions had not been made in the court below.

4th objection of the appellant is, that the contract between *Stocksdale* and the Canal Company, is not established by legal proof.

This objection, which in fact is merely formal, comes too late—by the 5th section of the act of 1832, already cited, this court is peremptorily forbidden "to notice, act upon, or determine any objection to the competency of witnesses and the admissibility of evidence, unless it shall plainly appear in the record that such point had been raised by exceptions in the Chancery court," &c.

The question involved in this 4th objection, is purely and only a question of the admissibility of evidence, and it is therefore too clear for argument, that under the above act, it cannot be made for the *first* time in this court, and there is every thing in the record to shew that it never was raised in the court below.

But if the question of the evidence of the contract of *Stocksdale* with the Canal Company, could be considered open to discussion, it would be no difficult task to shew that the testimony in the record, is both competent and sufficient to establish the existence of that contract.

In the deposition of *Stocksdale's* 2d answer, page 12, it is stated that "Exhibit A, is a true copy of the contract entered into between the deponent and the *Chesapeake and Ohio Canal Company.*"

This is positive legal proof of the truth of the copy, and implies that the witness had the means, and used them, of making the requisite comparison of the copy with the original.

A certificate of a copy of a record, under seal, and which is every day used as evidence, never states that the copy was compared with the original, but certifies simply that the copy

is a true one, a comparison by which the truth is ascertained, being of course implied, though not stated—and so it is where the truth of a copy is proved by the oath of a witness, instead of a seal. Exhibit A then, is a true copy of the original contract, and the question then is, whether as a copy it can be admitted as evidence in this cause; and I think it can, as the original could not be produced. Formal application was made for it, (at the request of the appellee, by *John Carrere, Esq.*) that it might be returned with the commission as evidence in this cause, of the Canal Company, through their secretary, *John P. Ingle:* that body acting through the same medium, refused to give up the original agreement, but offered to furnish a copy.

This letter, in refusing the original contract, evinces that it was as much out of the power of the party to produce it in this cause, as if it had been lost or destroyed. For he resorted to petition and request, which were the only means in his power to obtain it, and his petition and request were denied, and the body who gave this denial, are extra-territorial, and cannot be reached by the compulsory process of any of the courts of this state—there is no other alternative but to take the copy in the place of the original. The principle is a sound one, and applicable here, that where the best evidence cannot be had, that which is secondary and inferior, must be resorted to.

But suppose this contract is altogether excluded from the consideration of the court, as inadmissible evidence, such exclusion will not, I apprehend, affect the decree of the chancellor. Because, independent of this agreement with the Canal Company, there was a verbal contract of co-partnership, between *Ward, Grove, & Fresh*, by which, they were jointly to complete the 147th section of the canal, and were among themselves to share equally in the profits and expenses of the work. This contract was carried into execution. The work was finished by the partners, and *Grove*, for their joint labours, received the entire compensation; and the

claims of *Fresh* now is, for his share of the profits of the work, which the evidence shews to have been $2,000.

Whether the contract of *Stocksdale* with the Canal Company, therefore, is proved or not proved, is I think immaterial, as the contract of co-partnership, and that the work was done under it by *Fresh*, *Ward*, *& Grove*, and that *Grove* received the whole amount of the compensation money from the Canal Company, are all facts, distinctly and fully proved. These facts being established, they afford ample ground for the decree of the chancellor, throwing out altogether the contract of *Stocksdale* with the Canal Company, for in truth it does not bear upon the merits of the present controversy. We seek to recover under a distinct contract, and upon facts which shew that *Grove* received money for our use as well as for his own, and has retained the *whole* for himself.

Dorsey, Judge, delivered the opinion of the court :

The first objection to the decree is, that the proceedings upon which it is founded were too summary. However severely the expedition with which this cause was brought to a final decree may operate upon the appellant, it was warranted by the acts of assembly, under which the proceedings were had, and therefore forms no ground upon which this court can reverse the decree.

The second objection is equally untenable. It urges the reversal of the decree, because it decreed that the bill be taken *pro confesso*. That part of the decree by which the bill was adjudged to be taken *pro confesso*, was only intended to operate against the defendant *Joseph Ward*, against whom publication as a non-resident had been duly made; and as against him, it was indispensable to a final decree in the cause. The testimony taken under the commission being admissible only against *Grove*, and in no wise binding the interests of *Ward*.

To the third objection no greater weight can be given. It alleges multifariousness in the bill of complaint. Whether that allegation be true or false is wholly immaterial, it being

conceded by the solicitors on both sides, that such a defect can only be taken advantage of by way of demurrer. But it is insisted, that the appellant never having appeared in the Chancery court until after the final decree, could not have used this defence before that tribunal, and should not therefore be denied its benefit before this court. This excuse gives to the appellant no such right. A court of equity extends no favours to those who are in default in disobeying its process. Had the appellant appeared in obedience to the mandate of the court, the defence now set up could not have been denied him, but having failed to do so, the consequences of his delinquency are justly visited upon him.

The fourth objection, which seeks to exclude the copy of the canal contract, introduced as evidence under the *ex parte* commission, is well taken if before the proper tribunal; on which question we mean to express no opinion. But concede the inadmissibility of the proof objected to, it is by no means certain that the other testimony in the cause does not render unnecessary the proof objected to; but whether it does or does not, we do not design to decide, as this case will be remanded to the court of Chancery, where in all probability the question will never arise.

Although the decree of the chancellor is not reversed for any of the reasons assigned, there is to it a fatal objection, arising under the testimony in the cause. The appellant has been decreed to pay to the appellee the one-third part of two thousand dollars, the alleged net profits of the partnership transactions, without its being proved that any portion of that amount was ever received by him. The only evidence tending to show such a receipt, is that of *Ambrose*, who states that *Grove* informed him "that he had had a settlement with the Canal Company, and had obtained a certificate for two thousand seven hundred and eleven dollars, sixty-eight cents, bearing date the latter part of December, 1833, or the 1st of January, 1834." Until this money has been actually or constructively received, or has been lost, by the negligence or misconduct of *Grove*, no decree against him predicated upon

its payment can be made. The bill was filed in less than eighteen months after the settlement took place, which is too short a time to raise a presumption of payment, sufficiently strong to render *Grove* personally answerable for the amount, and there was nothing in the nature of the settlement that imposed on him such a responsibility. The decree of the chancellor, therefore, is erroneous in so charging him. It is also erroneous on another ground, though perhaps one for which, on the present appeal, it could not be reversed. Yet as this case must be remanded for further proceedings in the court of Chancery, it is proper that we should suggest it, that it may be remedied by the final decree of that court. In a bill for an account, filed by one partner against his co-partners, after the termination of the partnership, all the partners, as well defendants as complainant, are regarded as actors, and the accounts must be stated by the auditor, and the concerns of the partnership and rights of the several partners finally adjudicated upon by the chancellor, in the same manner as if each partner was a complainant, filing a bill against his co-partners. The chancellor would not otherwise finally adjudicate upon the whole case before him. Such was not the course of proceedings adopted in this cause. The audit was made, and the decree passed, simply upon the claims of the complainant against the defendants, his co-partners, leaving the claims of the defendants as between themselves wholly undetermined.

This court will sign a decree, reversing without costs the decree of the chancellor, and remanding this cause to the court of Chancery, that such further proceeding may be had therein, as may be necessary to a final decree upon the rights of all the parties, according to their respective equities.

CAUSE REMANDED.

The President and Directors of the Union Bank of Maryland *vs.* Reverdy Johnson and John Glenn. *December*, 1837.

On the 23d of March, 1834, E. P. conveyed to the plaintiffs all his estate, real, personal, and mixed, in *trust* to sell the same, and apply the proceeds to the indemnification of the plaintiffs and others, against certain responsibilities which they were under for him. This deed was duly acknowledged, on the day of its date, but not recorded until the 30th of June following.

On the 8th of May, 1834, the said E. P. in consideration of the said responsibilities, and of other debts due from him, executed another deed to the plaintiffs, conveying to them all his property and estate, rights, and credits; in trust to indemnify the plaintiffs and others, and for other purposes.

Certain agents of E. P. on the 24th March, 1834, remitted him by mail, a draft for $5,000, at 60 days, drawn on a mercantile house in New York, which was received by him in Baltimore on the 7th of April, following.

On the same day E. P. endorsed and delivered the draft to P. E. & Co. who deposited the same with the defendants for collection on the same day, in the usual course of business.

This draft was forwarded by the defendants to New York for collection, was paid there on the 11th of June, 1834, by the acceptors; the proceeds received by the defendants on the 14th of the same month, and on that day was passed to the credit of the depositors, P. E. & Co.

On the 2d of June, 1834, the plaintiffs apprised the defendants by letter, that they claimed the proceeds of this draft, under the before mentioned deeds, if it was received by E. P. subsequently to the 23d of March, or was in his possession on that day, and not discounted by others.

After the receipt of this letter, and after the receipt by the defendants of the money for the draft, to wit: on the 5th July, 1834, they, in conformity with the opinion of counsel, paid the same to P. E. & Co.

The plaintiffs offered evidence to show that P. E. & Co. were indebted to E. P. at the date of the deed of the 23d of March, 1834, and on the 7th of April following, when he endorsed the draft in question to them, and that they had knowledge of the execution of the deed.

It was in proof, that the plaintiffs up to the 7th of April, 1834, had paid no money, nor suffered any loss on account of their responsibilities for E. P. though after that date, they had collected and paid away various sums under the deeds.

Upon this state of facts, the plaintiffs instituted suit against the defendants on the 5th July, 1834, for the amount of the draft, and it was *held*, upon appeal, that they were entitled to recover.

Appeal from *Baltimore* county court.

This was an action of *assumpsit*, brought by the appellees against the appellants on the 5th day of July, 1834, to re-

cover the sum of $5,000, had, and received by the appellants, to the use of the appellees. The defendants pleaded *non assumpsit*, on which issue was joined.

At the trial, the plaintiffs to support the issue on their part, offered in evidence to the jury, that the Bank of Maryland, whereof *Evan Poultney* was president, and principal owner, being in embarrassed circumstances, and compelled to stop payment, the said *Evan Poultney* on the 23d March, 1834, executed the following deed to the plaintiffs in this cause.

EVAN POULTNEY, *deed of trust to* JOHN GLENN *and* REVERDY JOHNSON.

This indenture, made this twenty-third day of March, in the year of our Lord one thousand eight hundred and thirty-four, between *Evan Poultney* of *Baltimore*, of the one part, and *John Glenn* and *Reverdy Johnson*, of the same city, of the other part, witnesseth, that whereas, the said *John Glenn*, and *Reverdy Johnson*, and *Hugh McElderry*, *David M. Perine*, and *Evan T. Ellicott*, are, and stand responsible to the *Union Bank of Maryland*, for and on account of the president and directors of the Bank of Maryland, and of *Evan Poultney* aforesaid, or of either of them, in certain sums of money, at the instance and for the benefit of said *Poultney;* and whereas, it is the wish and desire of the said *Poultney* to save harmless, and indemnify the said *John Glenn*, *Reverdy Johnson*, *Hugh McElderry*, *David M. Perine*, and *Evan T. Ellicott*, for and on account of said responsibility, and for that purpose executes these presents. Now this indenture witnesseth, that for and in consideration of the premises, and of the sum of five dollars, to the said party of the first part paid by the parties of the second part, he, said party of the first part, hath granted, bargained and conveyed, and by these presents doth hereby grant, bargain and convey, to the said parties of the second part, all his, the said party of the first part's, estate, real, personal, and mixed, of every kind and description whatsoever, wherever situated. To have and to hold the said estate, real, personal, and mixed, to them, the

said *John Glenn* and *Reverdy Johnson*, parties of the second part, their heirs and assigns forever, to and for their exclusive use and benefit. In trust, nevertheless, that they, the said *Glenn* and *Johnson*, their heirs, executors, and administrators, shall, at such time and times as they may deem it necessary, to and for the purposes of saving and indemnifying themselves, and the other parties aforesaid, sell and dispose of the said estate, real, personal, and mixed, and on such terms as they may deem proper, and at either public or private sale, and in further trust, that they apply the proceeds of the sale or sales of said property, as aforesaid to be made, to the payment and discharge of the responsibilities aforesaid, held by the said *Union Bank*, and for which they, the said *Glenn*, *Johnson*, *McElderry*, *Perine*, and *Evan T. Ellicott*, are liable as before mentioned. In testimony whereof, the said *Evan Poultney* hereto affixes his hand and seal, the day and year herein before written. EVAN POULTNEY. [Seal.]

Which said deed, it is admitted, was executed and acknowledged on the day of its date, but was not recorded until the 30th June following, and that on the 8th May following, the said *Evan Poultney* executed to the same parties, another deed in the following words and figures, to wit:

EVAN POULTNEY, *deed of trust to* REVERDY JOHNSON *and* JOHN GLENN.

This indenture, made this eighth day of May, in the year of our Lord one thousand eight hundred and thirty-four, between *Evan Poultney*, of the city of *Baltimore*, and state of *Maryland*, of the one part, and *Reverdy Johnson* and *John Glenn*, of the same city and state, of the other part: Whereas, the said *Evan Poultney* has heretofore obtained a loan at the *Union Bank of Maryland*, of fifty thousand dollars, on a certificate of special deposite issued by the Bank of Maryland, in his favour, and endorsed by him, and at his instance, and by his request, by the said *Reverdy Johnson*, *John Glenn*, and others, which loan was passed by him to the credit of said Bank of Maryland. And whereas, also, the said *Reverdy*

Johnson, *John Glenn*, and others, also loaned their three notes for ten thousand dollars each to said *Poultney*, upon which he also obtained at said *Union Bank of Maryland*, a loan for that amount, which was immediately passed to the credit of said Bank of Maryland. And whereas, at the time said *Reverdy Johnson*, *John Glenn*, and others, endorsed said certificate and loaned said notes, it was in consideration that said *Evan Poultney* agreed to save harmless and indemnify them, from all loss or damage from said endorsement and notes. And whereas, as a further protection to said parties, there was placed by said *Evan Poultney*, to their credit, in the Bank of Maryland, and which has ever since remained there undiminished, the sum of thirty thousand dollars. And whereas, also, the said *Reverdy Johnson*, *John Glenn*, and others, will be entitled, on payment of said certificate and notes to the *Union Bank of Maryland*, to be substituted to the rights of said latter bank, as a creditor of the Bank of Maryland, and of said *Evan Poultney*, and to all securities, collateral or otherwise, which the said *Union Bank* may hold or be entitled to, for and on aecount of the loans aforesaid. And whereas, the said *Evan Poultney* is also indebted to the General Insurance Company in an unsettled account, and is also indebted to the president and directors of the Bank of Maryland, or their trustees, *Thomas Ellicott*, *John B. Morris*, and *Richard W. Gill*, all of which he is desirous to secure. Now this indenture witnesseth, that for and in consideration of the premises, and of the sum of ten dollars, to him in hand paid by the said *Reverdy Johnson* and *John Glenn*, the receipt whereof is hereby acknowledged, he, the said *Evan Poultney*, hath given, granted, assigned, bargained and sold, and by these presents doth give, grant, assign, bargain and sell, to the said *Reverdy Johnson* and *John Glenn*, their heirs, assigns, all the property and estate, rights, and credits of him, the said *Evan Poultney*, hereinafter particularly mentioned, that is to say, one-eleventh interest in the real estate of the father of him, the said *Evan Poultney;* the lot or lots at the intersection of *Charles* and *Fayette* streets, on which are

erected a dwelling and warehouse; a house and lot on *Pennsylvania Avenue* in the city of *Baltimore;* a tract of land in *Baltimore* county called "*Tunis*," with all and singular the improvements, and so forth, containing about six hundred acres—ground rents amounting to fifteen hundred dollars per annum; a tract of land called *Pickway Plains*, situate on the *Sciota* river, in the state of *Ohio*, containing one thousand acres; a house and lot in the village of *Bowling Green*, in the state of *Kentucky;* eight hundred and eighty-four shares of stock in *Baer's* Chemical works; one thousand shares of stock in the Commercial Bank of Millington; one hundred and fifty shares United States Insurance Company stock; five shares Baltimore and Wheeling Transportation Company stock; twenty shares in the Winchester Rail Road Company; sixty-eight shares Eastern Savings' Institution stock; forty shares Union Bank of Maryland stock; one hundred and sixty-seven shares Union Bank of Maryland stock, purchased of *George Carey*, hypothecated at the Savings' Bank for ten thousand five hundred dollars; fifty shares Life Insurance Company stock; nine hundred and fifty shares Bank of Maryland stock; my interest in the business of *L. L. Fowler & Co.; B. W. Hewson & J. B. Steinberger & Co.;* claim on *Maclay* and *Asher* amounting to twenty-three thousand three hundred and thirty-seven dollars and fifty cents, and also, all the other property and estate, rights, and credits of him, the same *Evan Poultney*, of every kind and description whatsoever, to which he may be in any way entitled, and wheresoever the same may be situated. To have and to hold all the aforesaid estate, real, personal, and mixed, rights and credits herein granted, conveyed and assigned, or intended to be hereby granted, conveyed and assigned to them, the said *Reverdy Johnson* and *John Glenn*, their heirs, executors, administrators, and assigns, forever; subject, nevertheless, to the several uses and trusts herein after stated, that is to say: in trust, in the first place, that they, the said *Reverdy Johnson* and *John Glenn*, their heirs, executors, administrators and assigns, shall, at such times and on such terms, as they may

think most advantageous to all the parties concerned, and either at public or private sale, sell or dispose of all, or any part of the estate and property hereby conveyed, and execute proper conveyances for the same, and also collect by suit or otherwise, all the aforesaid rights and credits, or compromise, or in any way arrange such portions thereof, whose collection may, in their discretion, be thought doubtful. In trust, in the second place, to hold and apply the proceeds arising from such sales, collections, or compromises, to save harmless and indemnify the said *Reverdy Johnson* and *John Glenn*, and others, from every kind of loss or damage, for, or on account of the before mentioned certificate of deposite, and three notes, amounting in the whole to eighty thousand dollars, endorsed and signed by the said *Reverdy Johnson*, *John Glenn*, and others, and discounted as herein before mentioned, and now held as aforesaid, by the *Union Bank of Maryland.* In trust, in the third place, to hold and apply the balance of the proceeds aforesaid, which may remain in their hands after the next preceding trust is gratified, to the payment and discharge equally and rateably, of all and every debt or debts which may be owing by said *Evan Poultney*, or for which he is in any way responsible. In trust, in the fourth place, to hold and apply the balance of said proceeds, which may still be remaining in their hands, to the payment and discharge, equally and rateably, of the balance of any debt or debts which may be due by the President and Directors of the Bank of Maryland, on any transaction of said bank, originating prior to the twenty-third day of March, eighteen hundred and thirty-four, after the assets then belonging to said bank, and conveyed by the president and directors thereof to *Thos. Ellicott*, *John B. Morris*, and *Richard W. Gill*, in trust, shall have been first applied to the discharge of the said debts. And lastly, in trust to pay over to the said *Evan Poultney*, his heirs, executors, administrators, and assigns, any balance of such proceeds that may remain in the hands of the said *Reverdy Johnson* and *John Glenn*, after each and every of the preceding trusts shall have been discharged. In testimony

whereof, the said *Evan Poultney* hath hereto set his hand and seal, the day and year first herein before written.

EVAN POULTNEY. [Seal.]

Which said deed was duly executed, acknowledged, and deposited for record on the day of its date. And the plaintiffs further offered in evidence to the jury the following letter, which, it is admitted, was written by the parties signing their names thereto, dated Apalachicola, March 24th, 1834, and addressed to *Evan Poultney*, post-marked 29th March, at Columbus, in the state of Georgia:

"*Apalachicola*, 24*th March*, 1834.

"EVAN POULTNEY, Esq. Baltimore.

"*Dear Sir*,—Your favour of 2d February, directed to us at Columbus, whence the writer has just returned, is before us. You instruct us to return the power of attorney—it has not been used—please find it enclosod herein. Enclosed also find our draft on *H. W. & S. Hill*, for five thousand dollars, at sixty days. When in Columbus the writer endeavoured to procure checks, but the cashiers of the banks were all absent on a visit to New Orleans. We now leave ten thousand dollars in United States notes, which we would remit you per mail, did your letter authorise us to do so, but we are not willing to take the risk. We had hoped that you would authorize us to pay over the funds to your agent here, or in New Orleans. All the Maryland notes which we have used here, were in bills on New Orleans, except three thousand dollars, which we paid out in our business—the bills do not mature until May, and one or two in June; hence our wish to hand over the exchange in New Orleans; however, we will endeavour to meet your views, and forward you funds as speedily as possible. The writer goes over in eight or ten days to New Orleans, and will, if possible, procure checks. If money matters are not too much derangod, we may be able to get the drafts running to maturity cashed; of this we can only conjecture. The specie that we brought over for Commercial Bank, was raised in New Orleans from our own friends, but predicated upon the remittances which we were to make on

bills with Maryland notes. When the rupture took place we then bought bills with specie, which we remitted to New Orleans. We have probably fifteen thousand dollars of your notes yet on hand, which we will use as occasion may offer for so doing safely—if we do not use it, will bring it on with us in May or June, as one of us expects to go north about that time. Any amounts we may send on to you, please receipt to *Wm. Reynolds & Co.* for, and in the summer we will take up all the paper, and make a full and final settlement.

Respectfully, &c. MACLAY & ASHER.

"P. S.—The writer will address you from New Orleans—we have written over there, ordering the drafts to be cashed if possible, as we are exceedingly anxious to close the transaction, and we suppose you want your money—in less than sixty days, sir, it shall be on the way."

Which letter, it is admitted, contained a draft drawn by *Maclay & Asher*, dated 24th March, 1834, for five thousand dollars, drawn on *H. W. & S. Hill*, of New York, in favour of *Evan Poultney*, and which letter and draft, it is also admitted, were duly received by *Evan Poultney*, in course of mail, on the 7th of April. That the said draft was endorsed by *Evan Poultney* to *Poultney, Ellicott & Co.* and by the said *Poultney, Ellicott & Co.* deposited with the defendants for collection, in the usual course of business, on the 7th of April. That the said draft, on the same day, was sent by the defendants, as bankers, in the usual manner of collecting bills abroad, to the Merchants' Bank of New York, and the money thereon collected from the Messrs. *Hill*, the acceptors, on the day the said bill became due, to wit, on the 11th of June, and the proceeds received from the Merchants' Bank of New York by the defendants, on the 14th June, and, on that day, duly placed to the credit of the depositors of the said bill, to wit, Messrs. *Poultney, Ellicott & Co.* but withheld payment thereof until the 5th July, 1834.

And the plaintiffs further offered in evidence to the jury the following letter, addressed by them to the defendants, dated on the 2d June, 1834, which said letter, it is admitted,

was in the proper hand writing of the plaintiffs, and was received on the day of its date by the defendants:

"ROBERT MICKLE, Esq. *Cashier:*

"*Sir*,—I am informed by the acceptors, Messrs. *S. W. & H. Hill*, of New York, that you are the holders of a draft for $5,000, drawn by *Maclay & Asher*, of Apalachicola, in favour of *Evan Poultney*, of this place, and which is now in the Merchants' Bank of New York, sent there by your bank for collection. You are apprised, I believe, if not this will inform you of it, that on the 23d March last Mr. *Poultney* executed to *John Glenn* and myself a deed of all his property, including the claim he then had against *Maclay & Asher*, and that early in the last month he executed another deed to us, both deeds intended for the benefit of his creditors.

"You will, therefore, please take notice, that Mr. *Glenn* and myself claim under those deeds, all property, rights, and credits of every description, belonging to Mr. *Poultney* on the 23d March last; and, consequently, that if the draft referred to was received by him subsequent to that time, or was in his possession on that day and not discounted by others, it is our property; and if such are the facts, which in a measure will appear by the draft itself, we shall claim the proceeds as soon as they are received by you.

Yours, respectfully,

REVERDY JOHNSON & JOHN GLENN,

By R. Johnson, *Trustees of E. Poultney.*

Baltimore, 2d June, 1834."

And the plaintiffs further offered in evidence to the jury, that *William M. Ellicott*, one of the firm of *Poultney, Ellicott & Co.* on the 23d of March, 1834, that day being Sunday, called on *J. B. Latimer*, a justice of the peace, and asked him to attend at the house of *E. Poultney*, in order to take the acknowledgment of the deed of 23d March, and that the said *William Ellicott* went with said *Latimer*, and was present when the said deed was executed. And the plaintiffs further offered in evidence to the jury, in order to show knowledge

in the said *Poultney, Ellicott & Co.* of the execution and tenor of the said deed of the 23d of March, the following letter, addressed by them to a certain *B. W. Hewson*, of Cincinnati, which letter is dated on the 7th June, 1834, and is admitted to be in the hand writing of the said *Poultney, Ellicott & Co.*:

"*Banking House of P. E. & Co. Baltimore, June 7th*, 1834.

"B. W. HEWSON,

"*Dear Sir*—Yours of the 2d is received; the draft in favour of *S. L. Fowler & Bros.* has been presented, and we have requested them to hold it until we wrote to you on the subject. It appears by a conversation with the trustees of *Evan Poultney*, that they *propose* to hold us responsible for all entries and transactions in which he is concerned since the 23d March—such being the case, although we feel confident that they cannot succeed in it, do you not think it would be better for you to make provision for those drafts of *Amelung's* out of the materials you have in hand, either by transferring notes or bills for the purpose, or even by holding the claim on *Amelung* for the benefit of *S. L. Fowler & Co.* This you can do, not having been officially advised of any deed or conveyance which ought to prevent you; whereas, if we were to make any payments on account of the concern, it is possible we might have to pay the same over again to the trustees, and have a suit to contend against in addition. *Fowler* can suffer no inconvenience in laying out of the money for a while, inasmuch as the money employed in that *concern* (*S. L. Fowler & Co.*) was all furnished by *Evan*—at all events it would be better to wait a while, and see what is likely to turn up. You may rest assured, that we shall suffer nothing to go out of our hands that we can keep, and will do every thing we can to protect you in the matter in every way. The course pursued by the trustees, *Morris & Gill*, in relation to the stock, seems very extraordinary, and deserving of such notice as we shall endeavour to take of it when the proper time comes. It is certainly calculated to injure you as well as ourselves, but it is only another instance of the utter recklessness with which they have thought proper to act towards all those whom they choose

now to consider themselves authorized to attack. We do not know whether the stock is sold or not, having sent it to New York to be sold at certain limits, which we are not advised whether they have been obtained or not. If it is sold and is sent to Cincinnati to be transferred, we presume the cashier will not hesitate to transfer it; we should think he would be very unjustifiable in doing so upon the faith of any such letter as the one you refer to, and would perhaps render himself liable for damages both to you and us. There is a scheme a-foot, by which the creditors of the Bank of Maryland intend to endeavour to put their affairs in a way to get rather more for them than they seem likely to do under the administration of Messrs. *Morris* and *Gill*. We send you the 'Republican' of this morning, containing the proceedings of the first meeting, also a copy of a circular addressed to the principal creditors. It is to be hoped that matters will, before long, be somehow got into a way which will be more satisfactory. We will write you again in a day or two.

Respectfully, POULTNEY, ELLICOTT."

And the plaintiffs further, to support the issue on their part, gave in evidence to the jury, from the books of *Poultney, Ellicott & Co.*, the following entries, contained in the leger in *Evan Poultney's* account:

"EVAN POULTNEY—page 604.

March 31.	F. Schelles' note,	$50	50
April 2.	ch.	800	00
" "	"	4,161	86
" "	"	5,000	00
" 4.	Paid S. Poultney, trustee,	12,676	45
" 9.	Bal. E. P. Bank,	16,972	99
" "	Bal. from Mountenay farm,	3,145	42
" 10.	N. Williams' note paid in Bank Md.	2,000	00
" 22.	ch.	204	51
May 6.	ch.	5,610	00
" "	ch.	476	85
" 23.	ch.	1,561	16

June	21.	35 shares Bank of Maryland stock, .	17,500	00
"	"	" " . .	2,950	00
"	25.	Sundries, ...	35	48
Aug.	14.	ch.	15	00
Sept.	3.	"	25	00
"	4.	bill, ...	5	00
Oct.	10.	ch.	20	00
Dec.	8.	Loss on Farmers' and Merchants' Bank Stock, ...	3,500	00
"	22.	Interest on his account, . . .	12,438	30
1835.				
Feb.	23.	do. do. . . .	121	33
March	4.	Paid Bank of Maryland on account of B. W. Hewson, . . .	895	51
"	26.	Sundries, ...	585	81
"	"	To sundry accounts as per journal entry in check-book P. . .	238	74
		To transferred to new account, .	188	93
1834.				
March	31.	. . . . .	100	00
"	"	Bal. of Bank of Baltimore Stock, .	176	00
April	2.	Cash, ...	4,213	03
"	5.	Ch.	15,000	00
"	9.	"	7,000	00
May	6.	"	2,000	00
"	"	"	3,000	00
"	"	1447, ...	4,969	17
"	8.	Cash, ...	6,965	32
July	5.	"	9,226	95
Dec.	12.	Balance of B. W. Hewson's account,	4,591	94
"	"	Balance of S. L. Fowler & Co's acct.	2,933	09
"	"	Balance of B. Poultney's account, .	843	17
"	22.	Part of certificate 1046 and interest,	6,200	00
"	"	Bal. Mountaney Farm and interest, .	3,278	03
1835.				
March	26.	By sundry accounts as per journal entry, in check-book P. . .	9,517	05

March 26. Balance of Bank Note account journal,
Ch. Bk. P. 85 00
" " Bills payable, ... 400 00
" " Transferred to new account, . 4,970 24
" " Sundries as per journal Ch. Bk. P. . 188 93."

Also, by the entries from the general leger of the said *Poultney, Ellicott & Co.* containing the account of special deposites due by that house on the 22d of March, 1834, when the Bank of Maryland stopped payment; that on that day said *Evan Poultney* had, to his individual credit, on special deposite with that house, $170,000, and as trustee $138,144 95, and that said account did not show who were the *cestui que trust* of said last deposite. And here the plaintiffs rested their case.

The defendants, to support the issue on their part, offered in evidence to the jury, after the plaintiffs had given all the above evidence, as herein before set forth, a letter dated June 30th, 1834, from the defendants to the plaintiffs, which letter it is admitted was duly received by the said plaintiffs, and is admitted by them as legal and competent evidence in this cause, which letter, it is admitted, contained a copy of the resolution of the bank of the 30th June, hereinafter set forth, as a part of the proceedings of the bank. And also offered in evidence the following extract from the minutes of the defendants, which, it is agreed, shall be received in evidence in the cause, which minutes contain the proceedings of the board of directors on the 30th June, the 3d and 5th of July, 1834, and shew that they consulted counsel as to their liability under the communication made by the plaintiffs to them on the 2d June, and that the said sum of $5,000 collected on the draft (the discount being deducted) was actually, and in fact, paid over to the said *Poultney, Ellicott & Co.* on the 5th July, in pursuance of the opinion of counsel:

" *Extracts from the minutes of the Union Bank of Maryland.*

" 1834, June 30. On motion, resolved, that the cashier be directed to ask from said parties (Messrs. *Johnson* and *Glenn*) the deeds of trust under which they make the claim

set up in the said letter (letter of June 2d) on or before Thursday next."

"1834, 3d July. Ordered, that this board request the opinion of *George Winchester*, Esq. as to the right of the bank to hold the sum of five thousand dollars, collected for account of *Poultney, Ellicott & Co.* and claimed by *Reverdy Johnson* and *John Glenn*, by their letter of 2d June last, and that the board meet on the morning of the 5th instant, at eight o'clock, to receive the said opinion."

"1834, July 5th. The president laid before the board the following opinion, obtained in pursuance of the minute of the 3d of July, 1834, viz.

"My opinion is asked by the *Union Bank of Maryland* upon the following statement of facts. *Poultney, Ellicott & Co.* private bankers in the city of *Baltimore*, on the 7th of April last, deposited with the *Union Bank of Maryland*, for collection, on account of said *P. E. & Co. Maclay & Asher's* draft on *H. W. & S. Hill*, of *New York*, for $5,000, the draft was forwarded in the usual way, became due on the 11th of June, and was duly paid. In the meantime, viz: on the 2d June, the *Union Bank* were informed by Messrs. *Johnson* and *Glenn*, that they claimed this draft as part of the property of *Evan Poultney*, who had transferred all his estate to them as trustees, by two deeds, one dated 23d March last, and the other on the 8th of May last. Upon examination it appeared, that no deed of the 23d March could be found on record; the deed of the 8th of May was executed and recorded on the day of its date. The deed of the 23d March, has since, viz: on the 30th June, been put on record." The question upon this statement is, has the bank a right to hold the money thus collected, and refuse to pay it over to *Poultney, Ellicott & Co.* on their order? I think not, and that in justice it cannot be properly withheld from them. As a general principle, which is essential to the regulation of banking and commercial operations, the *Union Bank* could know no one in this transaction but *Poultney, Ellicott & Co.* from whom the draft was received, and to whom alone the bank was accountable.

Such is the universal practice, and this, like all other cases, must be governed by it. Or, a contrary principle, if adopted, must be equally general in its operation, and thus establish an inquisition into the private concerns of all persons who had dealings with the bank. The bank cannot recognize any other person as having an interest in a bill or note, but he who appears as the holder of it; any other course would involve them in interminable litigation. Courts of justice are the proper tribunals for the decision of all such questions. But even if the bank were at liberty to exercise a discretion in the matter (which I do not think they are) it would not alter the case. It appears that the bill was deposited for collection by *P. E. & Co.* on the 7th of April, 1834, and that the deed of trust (which was duly executed and recorded) was made on the 8th May following, a month after. Now the title of *P. E. & Co.* under the legal operation of this deed, could not be affected to the bill itself, in their hands as endorsers, or will the bank undertake to step over these facts, and institute an inquiry, as to how and when, and from whom, and upon what consideration, *P. E. & Co.* received this bill, and to determine to retain the funds to meet what, in their view, may be the proper mode of distribution. According to the deed, the trustees have clearly no right to the bill, as it was passed away before the deed was made in the ordinary course of commercial operations. Whatever the claim of the trustees may be, is a matter between them and *Poultney, Ellicott & Co.* to be decided in the ordinary way, and before the proper tribunals, and no where else. The production of the private deed of the 23d March, and putting it in record long after the bill was paid, and the funds in the hands of the *Union Bank*, as agents of *Poultney, Ellicott & Co.* does not alter the case; why this deed has been kept back, and why it is now produced, will, no doubt, be a subject of investigation elsewhere; certainly the bank have nothing to do with it. Can the bank undertake to say how far it is valid; whether it was not revoked by the subsequent deed, and so understood by all the parties, or in one word, how can they

undertake to decide any question about it? The state of the case is simply this—the bank finds itself in the possession of the proceeds of a bill collected for one of its customers, in the ordinary course of business, who requires it to be paid over to him; another person interposes a claim and says, I am entitled to it under a deed made to me at such a time, and here it is—it turns out to be a month after this bill was transferred to the present holder—but, says the claimant, here is another deed of an earlier date, which it did not suit me to make use of, but which I bring forward now, as showing me to be entitled to it, and I pray you to hold this money until the validity and effect of this deed shall be established by law. Under such circumstances there would seem to be no difficulty as to the course of the bank. There is another view of this subject, which shows that the bank ought not to interpose to arrest these funds, to the injury of their acknowledged principal in the business. It appears by *Mr. Johnson's* letter, dated 2d June, that he had corresponded with the acceptors of the bill in *New York*, and knew at what bank the bill was placed for collection, it was in the power of the trustees then (if they had a legal or equitable right) to have instituted legal proceedings in *New York*, and have arrested the funds from passing into the hands of *Poultney, Ellicott & Co.* and thus have placed the controversy where it ought to stand, between the trustees of *E. Poultney*, and *Poultney, Ellicott & Co.*—having failed to avail of this remedy, the natural, and proper, and legal one, is it to be expected that the bank will consent to interpose itself between the litigants, after the money has been collected and is virtually in the hands of *P. E. & Co.* I would again remark, that the clear remedy of the trustees is against *Poultney, Ellicott & Co.* who are responsible for whatever claim may exist against them, in the courts of law or equity. GEORGE WINCHESTER, *4th July*, 1834."

When, on motion, it was resolved, that the cashier be directed to pay to *Poultney, Ellicott & Co.* the sum of $5,000, mentioned in the said minute of the 3d inst."

And the plaintiffs, on their part, offered in evidence to the

jury, that in reply to the letter herein before set forth and described, as addressed to them by the defendants, dated 30th June, as aforesaid, they sent to the defendants a copy of the deeds of the 23d March, and 8th May, 1834. And the plaintiffs further offered in evidence, from a book of *Poultney, Ellicott & Co.* entitled "Personal Account Ledger," as herein before inserted. (It is understood that the defendants reserve to themselves all legal objections to the testimony herein above set forth in this statement of facts, so far as the same is offered to prove that *Poultney, Ellicott & Co.* or *Thomas Ellicott*, had knowledge of the deed of the 23d March, 1834.) It is admitted by the plaintiffs, that up to the 7th of April, 1834, and for some time afterwards, they were not obliged to pay, nor had they paid any moneys, or suffered any loss, on account of the said *Evan Poultney*, against which the said deed was intended to indemnify them; but that the said plaintiffs have, from time to time, since the 7th of April, collected and paid over various sums of money, received from divers persons, under and by virtue of said deeds of 23d of March, and 8th May, 1834, all of which was paid to the defendants, under and in pursuance of the said deed, and was known by defendants to have been received by plaintiffs under said deeds of 23d of March, and 8th May, 1834. It is also admitted, that no measures were taken at law or otherwise, except such as is herein before set forth by the plaintiffs, to arrest or suspend the negotiation of the draft for $5,000, nor that the same was ever delivered to them, nor its delivery demanded by them from any of the parties into whose hands it had passed. It is further admitted that they were under liabilities for the said *Evan Poultney* to the defendants, as security for him, at the date of the said deed of 23d March, to the amount of $80,000, and these are the only liabilities of said plaintiffs for said *Poultney*. Whereupon, the defendants, by their counsel, prayed the court, upon all the evidence above set forth, to instruct the jury, that if they believe the evidence in the cause as above set forth, the plaintiffs are not entitled to recover in this action.

1. Because the deed of 23d March, 1834, from *Evan Poultney* to the plaintiffs, not having been recorded until the 30th June following, did not pass a title in the bill in question to the said plaintiffs, which was valid and operative in law against the title acquired by *Poultney, Ellicott & Co.* under the endorsement and delivery to them from *Evan Poultney.*

2. Because no title to the bill passed by the said deed to the said plaintiffs, the said bill never having been delivered to the said plaintiffs, either at the date of the deed or afterwards, and the said plaintiffs never having forbidden the negotiation of the said bill, by notice or otherwise, and the said bill being, in fact, negotiated by the said *Evan Poultney*, by endorsement to *Poultney, Ellicott & Co.* and by *Poultney, Ellicott & Co.* deposited with the defendants for collection.

3. Because the items of the deed do not comprehend or include *choses in action*, or bills, or promissory notes, and therefore conveyed no title to the bill in question to the said plaintiffs.

4. Because the deed of 23d March, being intended to save harmless and indemnify the grantees against liability, and to secure them for any payments they might be obliged to make on account of *E. P.* and the said *Johnson* and *Glenn* having neither taken possession of the draft in question, nor forbid its negotiation, nor resorted to any measures at law or otherwise, to obtain possession of the draft, or to arrest or suspend its negotiation, and the said *Johnson* and *Glenn* not having been obliged, up to the 7th of April, to pay any money for the said *Evan Poultney*, nor in other way having incurred loss against which the deed was intended to secure them, by reason of all which, the said plaintiffs acquired no title under the deed sufficient to invalidate the right of the defendants, to pay over the proceeds of the draft to the said *Poultney, Ellicott & Co.*

5. Because, although the said deed may have conveyed the interest of the said *Evan Poultney*, in the said draft, to

the said plaintiffs, yet the said draft having been assigned, by endorsement and delivery, to the said *Poultney, Ellicott & Co.* and by them deposited with the defendants for collection, and by them collected and paid over to the said *Poultney, Ellicott & Co.* the defendants were bound to account for the proceeds of the said draft, and justified in paying over the same to the persons from whom they had received it.

6. Because that the said deed of the 23d March, although it may have conveyed the interest of *Evan Poultney* in said draft to the said plaintiffs, yet the same not having been placed on record, or notice thereof given to the said defendants, when the said draft was deposited for collection in the *Union Bank*, and when the liabilities of said defendants, as agents in the collection of said draft, commenced to the said *Poultney, Ellicott & Co.* the subsequent notice given by the said plaintiffs to said defendants on the 2d June, could not alter or modify the obligation already existing on the part of said defendants, to account for and pay over to the said *Poultney, Ellicott & Co.* the proceeds of said draft when collected.

Which instructions the court refused to give—the defendants excepted.

The jury found a verdict for the plaintiffs for $5,000, and the defendants appealed to this court.

The cause was argued before Buchanan, Ch. J. Stephen, Dorsey, and Chambers, Judges.

Latrobe, for the appellant:

There are but two main questions. 1. Is to ascertain the relations which subsisted between *Poultney, Ellicott & Co.* and the *Union Bank*, on the 7th April, 1834. What the obligation of the bank resulting from them? And 2. Was that relation modified or released by the notice of the plaintiffs below?

The relation in the first case, was that of principal and agent. The obligations on the bank arose from its character as agent. What then is the effect of notice by a third party

to an agent? How far are third parties empowered to release the bank from the obligation to pay *Poultney, Ellicott & Co.*? The agent cannot be liable to two principals; therefore if the notice made the bank liable to the plaintiffs, it must also release the bank from liability to *Poultney, Ellicott & Co.* Nor can there be a better test than whether the defendants are still liable to that firm. If responsible to them, they are not responsible to the plaintiffs. It is unnecessary to review the law of principal and agent. *Paley on Agen.* 289, lays down the rule, that where an agent names his principal, the principal and not the agent is the responsible person to *third* parties. *Paley on Evid.* 304. An agent receives money from his principal, and which may be recovered from the principal. As long as the agent has the money, the creditor has an election. But this is when the party paying the money seeks to recover it back. It does not apply to a *third* party. *Butler and Harrison, Cowper.* 3 *Maul. and Sel.* 344.

Again: An agent is liable to a *third* party where he receives money specifically appropriated to a *third* party. There if he is expressly bound, he becomes liable to pay such third party. 14 *East.* 582. 3 *Price*, 58. 3 *B. and Ald.* 664.

An agent is only liable when there is privity either between the third party and the agent, or his principal. It is not pretended here, that the *Union Bank* received the money from the plaintiffs, nor any specific appropriation of the fund.

The plaintiffs contend that the draft in question was their property, and that a liability results from paying their money to *Poultney, Ellicott & Co.*

This involves two questions: 1. Can the plaintiff try title in an action against the agent, the bank? 2. Did the deeds show they had title?

That this title of plaintiffs cannot be tried in an action against these defendants, and that the agent cannot be converted into an implied trustee. See 5 *Mad. C. R.* 36. 9 *Price*, 269. 4 *Eng. Ex. Rep.* 89. 2 *Bar. and Ald.* 310. 7 *Bing.* 339. 2 *Hall. N. J.* 1. 9 *Bing.* 312. 23 *Serg. and Low.* 312.

The present case is distinguishable from that in 9 *Bing.* on the ground of fraud.

If the plaintiff intended to rely on fraud, the notice was not sufficient. The notice relies on the deeds only; the first deed was not recorded, and was not evidence to the bank. It was not known to *Poultney, Ellicott & Co.* so as to make their conduct fraudulent; nor is there any proof of fraud on this record. The second deed was a substitute for the first. That deed did not convey the draft; it only conveyed $23,000 of *Maclay & Asher's* debt, while they on the 24th March still owed him $28,000.

If competent to make the bank an implied trustee, the plaintiffs exhibit no such title as will make the bank liable. What sort of notice is sufficient to effect this object? From whom may it come? Its effect upon the character and means of merchants and bankers would be ruinous. The rule is liable to great abuse. The stoppage of funds in the hands of a bank by mere notice, would be highly prejudicial, and the general rule, which requires privity of contract, is salutary.

Notice of all facts in possession of the claimant should be given, and it should state the facts necessary to make out the title on which reliance is placed. Here the facts of the title are displayed. It depends on the deeds alone, but no more. 7 *Bing.* 20 *Serg. and Low.* 426. *Buller N. P.* 133.

The action of a third party against an agent or collector, cannot be sustained if he can show the least colour of right in his principal; and here the bill of exchange was transferred at law.

R. Johnson, for the appellees:

The responsibilities of the appellees for the debts of the Bank of Maryland, were all in the hands of the *Union Bank of Maryland.* The record does not state the time of the failure of the Bank of Maryland, nor when the former dynasty of the *Union Bank of Maryland* terminated, nor show the prompter of the payment to *Poultney, Ellicott & Co.;* but the deed of March, 1834, was executed in the presence of *William M.*

Ellicott, one of the firm of *Poultney, Ellicott & Co.* That deed was one of indemnity. The deed of May was not a substitute for the deed of March; it contains other stipulations; it gave security to the creditors of the Bank of Maryland generally. The ground of the second deed is greater than the first; the objects of the two were not the same. The latter called for more property, but did not abandon any thing which the first conveyed. It was no extinguishment of the deed of March.

The evidence shows that on the 23d March, 1834, besides $80,000 in hand, due *Evan Poultney*, they, *Poultney, Ellicott & Co.* owed *E. Poultney* $170,000. This appears by their books, in all $250,000 due him, *Evan Poultney*, individually. And also, upon special deposite, in trust for some undisclosed principal, $138,000—making in all, nearly $400,000. The effect then, of the deed of March, known to *P. E. & Co.* was to convey all the funds in their hands, belonging to *Evan Poultney*. It was not confined to *Maclay* and *Asher's* debt.

The open account shows payments to *Evan Poultney*, or on his account, the whole sum of $80,000. And there is a piece of evidence, the letter of the 7th June, 1834, addressed to *B. W. Hewson*, pregnant with fraud. This letter was read at the trial without objection—read to show *P. E. & Co's* knowledge of the deeds of March and May, 1834, and that under the deed of March, the appellees, as trustees of *Evan Poultney*, claimed this property, and honestly suggested to *Hewson*, that as he was not officially advised of the deed, he might hold on to the property, though *Poultney, Ellicott & Co.* could not. Their notions of fraud being notified of the deed forbidding it. *Maclay* and *Asher*, from *Apalachicola*, 1,000 miles off, mailed the draft for *Evan Poultney* on the 29th March. It reached him on the 7th April, 1834. On that day he endorsed it, delivered it to *Poultney, Ellicott & Co.* and they deposited it in the *Union Bank* for collection. On that day *Poultney* was a large creditor of that concern, and no evidence to show that *P. E. & Co.* had paid one dol-

lar of consideration for this draft of $5,000. The draft was remitted by the *Union Bank* to *New York* for collection. The appellees hearing of this draft, inform Messrs. *Hills*, the acceptors of their property in it, and they notify the *Union Bank* not to pay—the draft *not* then being collected. The *Union Bank*, then not creditors of *P. E. & Co.* and the notice informed them that the claim was made under their deeds. The money was received on the 14th June, 1834, and the bill paid some twelve days after notice. From the 14th June until the 30th, 16 days, the bank rested on the notice, and then the deeds of trust are asked for. Being produced on the 3d July, the opinion of *Mr. Winchester* is asked for, and a special board of directors was called at 8 o'clock on the 5th July, which sanctioned the payment of the money we now claim—and we are told we have no right.

As a general rule between principal and agent, the *jus tertii* cannot be tried. The counsel is in error in supposing the *jus tertii* cannot be tried for want of privity of contract. The case in 23 *Serg. and Low.* 312, if the want of privity is the ground of the doctrine, cannot be sustained. In that case there was neither contract nor privity.

The case of 20 *Serg. and Low.* 153, certainly decides that the character of principal and agent, as a universal proposition, does not exclude from the agent the right of setting up the true owner, or prevent the true owner from recovering from the agent.

There is no rule of policy which throws the true owner on the principal, and forbids his proceeding against the agent himself. If he recovers against the agent, it is the judgment which is the protection of the agent against the principal.

As respects the agent, he is just as much protected in deciding the title between him and the true owner, as between him and his principal.

The case then, in effect, decides that the agent can only protect himself against the true owner, by setting up a better title in his principal.

The action of ejectment furnishes an analogy. Why should

circuity of action be sustained? The true owner must have his remedy against somebody. The argument on the other side concedes we could recover from *Poultney, Ellicott & Co.* upon the deeds. The objection is not a want of title in the plaintiffs, but a want of title as against the agents of *P. E. & Co.*

If the rule applies at all, it applies to an agent who does not pay over. The plaintiffs then would be bound to wait until the principal recovered from his agent. This is delayed and increased litigation.

All the cases relied on, are cited in *Hademan vs. Wilcox*, 23 *Serg. and Low.* 312. That case is a decisive authority here. It proceeds on the ground that the plaintiff and an insolvent by collusion, put goods into the hands of the plaintiff's agent, and yet the agent set up the title of the insolvent's assignees as a defence.

In this case there is abundant evidence of collusion, and the proof is left without explanation, which authorized the rejection of the defendants' prayers below.

Upon their doctrine the fraudulent collusion might be found, and this court is asked, despite of that, to say the plaintiff cannot recover here, because of no privity between plaintiff and defendant.

The counsel attempts to distinguish this case, on the ground that in the decision in 23 *Serg. and Low.* the agent was informed of the fraud, and here the agent was only notified by implication. He thinks that notice of fraud is essential to maintain the action against the agent, and that on such a notice, and proof of fraud, the recovery may be had. They say we can recover from the *New York Bank*, or from the acceptor. The one being agent, and the other having only contracted with the legal owner of the draft. This in truth, is a surrender of the case.

The notice is no part of the cause; it is a caution to the agent, who, if he pays without notice, is justified; but if he pays after notice, he is liable if the fund belongs not to his principal. A suit against the agent operates as notice.

Independent of all notice, so long as the fund remains with the agent, the true owner may sue at once. The suit is no allegation of fraud, nor notice of fraud. Fraud, in fact, sustains the action. The whole object of notice is to protect the agent from an innocent payment to his principal. The want of privity is not sufficient to defeat the true owner. Either the proceeds of the draft, or the draft, may be recovered. If fraudulent collusion does not divest the plaintiff below, who can doubt but that *trover* would have lain for the draft.

Then the nature of the notice given to the bank, and the deeds of *Poultney* laid before it. The bank knew of his endorsement; the dates of the transaction. They knew the draft not endorsed prior to 23d March, and when he endorsed it, that he parted with funds *not* his own. They knew the transfer was a fraud on the deed.

The opinion in 23 *Serg. and Low.* places the right on the fraud in fact, and not on the notice.

If *Poultney* had himself given the draft to the defendants, there could be no doubt about the action; and the intervention of *Poultney, Ellicott & Co.* can make no difference. They claim by a fraudulent collusion with *Evan Poultney*, which cannot fortify their right.

The prayers here were erroneous, because they took the case from the jury—fraud or no fraud. They were intended to take from the jury the very ground on which the right to recover existed, and on which the jury found.

Then as to the operation of the deeds, the recitals of the deed of 24th March gave notice to three parties. It was valid as respects *Poultney.* When he received the draft in April, he knew he was receiving what he had no title to. The deed passed all he had. On the 11th June, when the fund was received by the bank, it was known the plaintiffs were entitled to it; they were the equitable owners of the sum—the proceeds of the draft. The moment the *Union Bank* received this fund it belonged to the plaintiffs, was for their use, and they can recover in this action. The act of 1829, ch. 151, would enable them to sue in their own names.

J. P. KENNEDY, in reply:

It is difficult to imagine a more perplexing position than that of our banking institutions generally, if the counsel for the appellees is correct. An institution daily concerned with the collection of paper belonging to numerous parties; a business requiring despatch and promptitude in its administration; that such a body should be liable to be placed in an attitude of litigation, called on to exercise her judgment between conflicting parties, and incur penal responsibilities for errors of decision, is an evil greatly calculated to diminish its utility. If a bank charged with the collection of negotiable paper is in the predicament supposed, it equally concerns both its customers and the community. If the credit, standing, and fortune of a trader is to be questioned upon a mere notice, he would often be forced to suspend payment, and await the determination of the question of right, shadowed forth by any claimant, and at the same time the bank refusing to pay, would be liable to damages to one party or the other.

What rule of conduct shall the courts establish for the government of agents? Can notice from any person suspend the payment of your notes? Must the notice establish title? Who is to be the judge of the title? Is the opinion of the astute to prevail? But this rule is not admitted.

It is said the notice is compulsory on the bank, to hold the fund at the high peril of all the consequences before stated. The amount is immaterial. If an agent submits to such a demand, he is responsible in damages.

In all cases, the agent ought to turn the party over to his principal, and be discharged. This ought to be his course of business. The other party may proceed by attachment or by injunction. To intercept the fund, he should be forced to resort to his legal or equitable remedies; adopt compulsory remedies as to the agent. This should be the general rule as to commercial agencies, that he may acquit himself by paying over, and so transfer the controversy.

The exceptions to the general rule are founded on fraud; the knowledge of that fraud should be carried home to the

agent, that he may determine how far his case is within the exception. Being satisfied of fraud, he ought to hold up the property.

Then, do the facts show any fraud between these parties, known to the agent?

At the time of the execution of the deeds, there was no design of fraud.

The court must determine on some grounds, that the agent is authorized to hold up the fund, or pay it over. No subject is more difficult to handle, and none more delicate, than the establishment of rules applicable to such subjects.

As to the facts; information of the failure of the bank was received on the 23d March. Various parties were bound by heavy liabilities for her. The deed was drawn up rapidly by the grantor, to secure them from responsibility. The 23d was Sunday; the character of the transaction is legible on the face of it; there is no reference to payments, nor any enumeration of the property conveyed—a broad conveyance of all the grantee had to cover all his debts. That done, the parties were secured and free from attachments. On the 8th May a deed was prepared more at leisure; a new deed was executed. The first deed was not recorded; the second deed was prepared and executed. No reason now existed for recording the first deed, which could give no vitality to the subsequent deed. In the letter of the 29th March, a draft arrives at *Baltimore* on the 7th April. The *Union Bank* finds it lodged for collection. No knowledge of the deed nor any fraud. Their duty was to send it forward. The trustees of *Poultney* come to the knowledge of this draft, and they give the notice in the record. No information of fraud is communicated to the bank. The notice is only a hypothetical statement. The *Union Bank* called for the deeds, and they had no reference to the transaction.

The misconduct of *Poultney, Ellicott & Co.* is not to be imputed to the *Union Bank;* the bank did not know that *Evan Poultney* was a creditor of that house, nor was the monstrous letter of *Poultney, Ellicott & Co.* known, which

showed *à priori* that they intended to fill their pockets. The *Union Bank* knew not of these things, but was left to act and decide upon its naked rights.

By the Court:

JUDGMENT AFFIRMED.

Henry Stevenson, *et al vs.* Edward Schriver and Wife.—*December*, 1837.

By the first section of the act of 1818, ch. 204, a party deeming himself aggrieved by the orders or decrees of the Orphans courts, may appeal to the court of Appeals, and the term "party," does not necessarily mean a litigant before the court, when the order or decree is passed, but any one on whose interests such order or decree has a direct tendency to operate injuriously.

An order of the Orphans court passing a claim of the executor, or administrator, against the estate, may be appealed from by a distributee or by a creditor, where the assets of the deceased are inadequate to the payment of debts.

The power of the Orphans courts in passing claims against the estate of the deceased, is not confined to strictly legal claims, but embraces every species of indebtedness, whether legal or equitable; nor is their authority in this respect limited to such as are proved according to the act of 1785, ch. 46.

They do not derive their power to pass open accounts from the 8th sec. of the 9th sub ch. of the act of 1798, ch. 101, nor are their powers on that subject imperatively restricted by it. The object of that section was to restrain the authority of executors and administrators in the payment of open accounts, not passed by the court, to such as were proved in the mode thereby prescribed.

The power of the Orphans courts in passing accounts before payment, is derived from the second section of the act of February session, 1777, ch. 8, and the first section of the 15th sub ch. of the testamentary system.

A testator bequeathed to his two grandaughters $9,000 each, with a direction that the said "legacy should be understood and deemed as given and bequeathed unto them, as their property respectively, and not either to their respective husbands or to their father," &c.

In a subsequent clause the testator said, "it is my will that if either of my said grandaughters should die under the age of 21 years unmarried, and without having any child or children, as aforesaid," then over to the survivor, &c.

Upon this will it was *held*, that upon the marriage of either of the legatees, the legacy vested absolutely in her, and that such portion of it as was re-

ceived by her husband during coverture, in virtue of his marital rights, became his property, for which his estate could not be charged by his widow after his death.

APPEAL from the *Orphans* court of *Baltimore* county.

On the 15th of April, 1837, *Elizabeth L. Stevenson*, widow of *Josias Stevenson, Jr.* late of *Baltimore* city, deceased, filed her petition, alleging that she is a creditor of the estate of her said husband, to the amount of $9,763 04, with interest thereon from the 25th day of May, 1825, and that she became the creditor *by reason of the conversion by her husband, of moneys belonging to her (in her sole and exclusive right, and under the management of trustees for her separate use)* to his own proper use, her said husband receiving the said amount, *under his promise and agreement to invest said moneys for the benefit of your petitioner*, but neglecting to make said investment as agreed upon. That upon the bill of complaint of one *Henry Stevenson*, filed in the High Court of Chancery, such proceedings were had, that the creditors of her said husband were ordered by the chancellor to file their claims, whereupon, your petitioner filed her claim for the amount of said moneys, so received by her husband in the said cause so instituted in the High Court of Chancery, as by an attested copy of said claim, herewith filed, marked exhibit A, which she prays may be had and taken as a part of this, her petition, will more fully appear. That the said bill of complaint was dismissed by the court of Appeals, and that your petitioner and her co-administrator are desirous to close their trust, and she prays, *that they may have a credit in their account*, as administrators, *for the amount of your petitioner's dividend of the assets, which may be declared on her claim aforesaid, and that your Honours will pass an order allowing said claim against said estate*, &c.; and she here exhibits as part of this, her petition, marked exhibit B, (and she prays it may be so considered,) an exemplification of the will of her grandfather, *Dr. Albert Du Fresne*, which vested in her for her sole and separate use, the moneys so converted by her husband as aforesaid.

Exhibit A, to said petition.

BALTIMORE, *March 2d*, 1835.

The Estate of Josias Stevenson, Jr. deceased.

1825. To ELIZABETH L. STEVENSON. DR.

May 25.—For this amount received by you for my sole and separate use from the executors of *Dr. Albert Du Fresne*, - - - $9,763 04

City of Baltimore, sct: Be it remembered, that on this second day of March, in the year eighteen hundred and thirty-five, before the subscriber, a justice of the peace, in and for the city aforesaid, personally appeared *Elizabeth L. Stevenson*, and made on oath on the Holy Evangely of Almighty God, that the above account is just and true, as it stands stated, and that she hath not, directly nor indirectly, received any part or parcel thereof, or security or satisfaction for the same. And at the same time also appeared *Philip Reigart*, and made oath on the Holy Evangely of Almighty God, that the executors of *Dr. Albert Du Fresne* paid to *Josias Stevenson, Jr.* in his life-time, and about the month of May, in the year eighteen hundred and twenty-nine, or some time in that month, a sum of money between nine and ten thousand dollars, which the said *Josias Stevenson* had previously agreed to invest in property for the use of the said *Elizabeth L. Stevenson*, but which investment the said *Josias Stevenson* did not make.

Sworn before WM. P. STEWART.

True copy.—Test, RAMSAY WATERS, *Reg. Cur. Can.*

State of Maryland, City of Baltimore, sct: On this fourteenth day of April, 1837, before the subscriber, a justice of the peace, in and for the city aforesaid, personally appeared *Elizabeth L. Stevenson* and *Philip Reigart*, and severally made oath on the Holy Evangely of Almighty God, that the matters stated in the within copy of an affidavit formerly made by them are just and true as within stated, and that the within account is *bona fide*, due as therein stated.

FRS. FORSTER.

Exhibit B. Extracts from the will of *A. Du Fresne:*

2d ITEM.—I do give and bequeath unto my two granddaughters, *Elizabeth Reigart* and *Maria Reigart*, the children of my dearly beloved daughter *Albertina Reigart*, deceased, late *Albertina Du Fresne*, the sum of eighteen thousand dollars; that is to say, the sum of nine thousand dollars to each of my said grandaughters, *as and for their absolute property, which said sum is to be taken and set apart for that purpose out of my personal estate, by the executors of this my last will and testament*, and the guardians of my said grandaughters herein after named and appointed, as soon as conveniently may be done after my decease, subject, nevertheless, to the restrictions and limitations herein after mentioned and expressed.

3d ITEM.—It is my will, and I do order and direct, that the aforesaid legacy, or sum of eighteen thousand dollars, shall be understood and deemed as given and bequeathed unto them *as their property respectively*, and *not either to their respective husbands or to their father, Philip Reigart, nor the step-brothers or step-sisters*, in case they or either of my said grandaughters, *Elizabeth* or *Maria*, should happen to die without having any child or children; and if either of them, the said *Elizabeth* or *Maria*, should die without having any child or children, then the whole of the said legacy or sum, shall descend, come, and belong, and I hereby bequeath the same unto the survivor of them. But in case they should both die without leaving any child or children, then and in that case, I do give and bequeath the whole and every part of the said legacy or sum of eighteen thousand dollars unto my son *Samuel Du Fresne*, or his legal heirs and representatives.

4th ITEM.—It is my will, and I do direct, that the aforesaid legacy or sum of eighteen thousand dollars, shall be placed out and continued at interest on good and sufficient security, as herein before ordered, by the executors of this my last will and testament, and the guardians of my said two grandaughters, herein after named, or the survivor of them, and be under the control and management, superintendance and discretion of my said executors and guardians, for the use and

benefit of my said grandaughters, *Elizabeth Reigart* and *Maria Reigart;* and that they, the said executors and guardians, or the survivors or survivor of them, do add the interest thereof as the same shall accrue or accumulate from time to time, (excepting, nevertheless, the sum of two hundred dollars, part of the said interest, yearly herein after allowed unto their said father, *Philip Reigart,*) shall be paid unto my said granddaughters, *Elizabeth Reigart* and *Maria Reigart*, to be equally divided between them on their severally attaining the full age of twenty-one years, or at the time of their marriage, in case they or either of them intermarry *after* attaining the said age respectively. And that the sum of two hundred dollars, part of the said interest, be paid to their said father, *Philip Reigart*, to be by him applied for the support, maintenance, and education of my said two grandaughters, *Elizabeth* and *Maria*, in a decent and becoming manner; but if the said *Philip Reigart* should omit or neglect to apply the said two hundred dollars for the support, maintenance, and education of my said two grandaughters, then and in such case my said executors and guardians shall, and may withhold and detain the said sum, and apply it to and for the use and benefit of my said two grandaughters, in such manner as they, my said executors and guardians, herein after named, or the survivors or survivor of them, in their best discretion may think proper or necessary.

5th Item.—It is my will that if either of my said grandaughters, *Elizabeth Reigart* or *Maria Reigart*, should die under the age of twenty-one years unmarried, and without having any child or children as aforesaid, then and in such case, *I do give, devise, and bequeath the whole of the said legacy or sum of eighteen thousand dollars, unto the survivor of them, in absolute property;* but if both the said *Elizabeth* and *Maria* should happen to die under the age aforesaid, unmarried and without leaving any children, then and in such case I do give, devise, and bequeath the whole of the said legacy, or sum of eighteen thousand dollars, with all the increase thereon, (if any) unto my said son *Samuel Du Fresne*, his heirs, execu-

tors, administrators, and assigns, to and for his and their behoof in absolute property.

8th ITEM.—As to all my moneys, estates, effects and property, of what nature or kind soever the same may be, which I am or may be entitled to, in any part of Europe, whenever the same shall be recovered, received, or remitted hither into this country, I do give, devise and bequeath the same in manner following, to wit: one equal half part thereof I do give, devise and bequeath unto my said son, *Samuel Du Fresne*, his heirs, executors, administrators, and assigns, to and for his and their proper use and benefit and behoof, in absolute property; and the other equal half part thereof I do give, devise and bequeath unto my said grandaughters, *Elizabeth Reigart* and *Maria Reigart*, share and share alike, to wit: the one equal fourth part thereof to each of them: and in case of the death of my said two grandaughters under the said age of twenty-one years, unmarried, and without leaving any child or children, then her said share or one-fourth part shall come to, and *I do hereby give, devise and bequeath the same, in absolute property, to the survivor of them;* but if both my said grandaughters should happen to die under the said age, unmarried, and without leaving any child or children, then and in such case, the said two equal fourth parts hereby given unto my said two grandaughters shall come or belong, and I do hereby give, devise and bequeath the same in absolute property unto my said son, *Samuel Du Fresne*, his heirs, executors, administrators, and assigns, to and for his and their proper use, benefit and behoof.

9th ITEM.—As to all the rest, residue, and remainder of my moneys, estate, effects, goods and chattles, or moveable property whatsoever, and of what nature or kind soever, and wheresoever the same may be, and not herein before particularly given, devised or bequeathed, and which I am or may be entitled unto at the time of my death, without any inventory thereof to be made, taken or rendered, or any part thereof—and as to all and singular my messuages, houses and lots, or pieces or parcels of ground, lands, tenements,

and hereditaments which I may die possessed of, or may be in any manner seized of and entitled unto, situate in the said city and county of *Lancaster*, in the state of *Pennsylvania*, or elsewhere in any part of the United States of America, with their and every of their rights, members, and appurtenances, I do give, devise and bequeath the same, unto my said son, *Samuel Du Fresne*, his heirs, executors, administrators, and assigns, for ever subject to, and charged nevertheless, with the said two legacies herein before given and bequeathed unto my said brother and sister, to be paid to them severally, in manner herein before mentioned and directed.

And lastly—I do hereby nominate, constitute and appoint, my said son *Samuel Du Fresne*, and my trusty friends, *Peter Reed*, (saddler,) and *Philip Gloninger*, both of the said city of *Lancaster*, and the survivors and survivor of them, to be the executors and executive of this my last will and testament, and also guardian and guardians over the moneys, effects, and estates, herein before given, and devised unto my said grandaughters *Elizabeth Reigart* and *Maria Reigart*, during their minorities, respectively, hereby revoking all former and other will or wills, testament and testaments, by me made; and declaring this, and no other, to be and contain my last will and testament. In witness whereof, I have hereunto set my hand and seal, the eighth day of December, in the year of our Lord one thousand eight hundred and twenty. A. Du Fresne. [Seal.]

And afterwards, to wit: on the 1st day of May, in the year 1837, *Henry Stevenson*, *Urath Stevenson*, *Urath Stevenson executrix of Josias Stevenson*, *Sr.* deceased, *Job Smith*, *Jr.* judgment creditors of the estate of *Josias Stevenson*, *Jr.* deceased, and the said *Urath*, as executrix aforesaid, being also one of the legal distributees of said estate, come here into court and caution the court against the passage of a claim against said estate, presented here by *Elizabeth Stevenson*, and filed with her petition aforesaid. And these creditors and distributees as aforesaid, respectfully protest against the allowance of said claim, and indeed against this court taking any order in the premises.

1. Because they deny the facts stated in the petition and affidavits attached to the claim, so far as they represent and attempt to shew that the said *Elizabeth* hath any just demand against said estate.

2. Because the will filed makes no such disposition of a fund for the benefit of said *Elizabeth*, as is specified in said petition.

3. Because the deceased husband of said *Elizabeth*, never received at any time any moneys from the persons under the circumstances, and for the uses of said *Elizabeth*, as is specified in said petition, account, and probat thereon.

4. Because the affidavits attached to said claim are insufficient to exhibit it before this court.

5. Because the said claim is irregularly, illegally, informally, and insufficiently made out and offered here.

6. Because the said claim is, and all claims that the said *Elizabeth* may ever have had against said estate, are barred by limitations. They are of more than three years standing, since the acts of limitation began to run against them, and these creditors and these distributees plead said acts of limitation in bar of said claim and claims, and pray to be allowed the benefit thereof.

7. Because the said claim was not adduced and exhibited in this court within the time limited and specified in the publications made by the administrators on *Josias Stevenson, Jr's* estate, for notifying creditors to bring in their claims, and also specified in the order of this court passed in that behalf.

The parties then filed in court a commission, containing certain proofs admitted by consent, a part of which only are material in the view taken by the court, viz.:

Samuel Dale, examined on behalf of the defendants, deposeth as follows:

2d. Have you any knowledge of a legacy bequeathed to the said *Elizabeth L. Stevenson*, by her grandfather, *Albert Du Fresne*, of the city of *Lancaster*, in the state of *Pennsylvania;* if so, please state the amount thereof, and the circumstances by which the said legacy was attended as regards the

payment of it over, and annex to your answer an examined and authenticated copy of the last will and testament of the said *Albert Du Fresne*, whereby said legacy was bestowed.

To said second interrogatory he deposeth as follows: Deponent says that he has knowledge of the legacy bequeathed to *Elizabeth L. Reigart*, now *Elizabeth L. Stevenson*, by her grandfather, Dr. *Albert Du Fresne*, late of the city of *Lancaster*, in the state of *Pennsylvania*. Deponent says that the amount due to *Elizabeth L. Stevenson* after the death of her sister *Maria*, under the will of her grandfather, Dr. *Albert Du Fresne*, deceased, was eighteen thousand dollars; and at the time it was settled, in 1829, when the executors were released, the legacies with their interests were nineteen thousand five hundred and twenty-six dollars and eight cents. Deponent says, some time in 1828 *Josias Stevenson, Jr.* came to the city of *Lancaster*, and demanded the legacy coming to his wife under the will of her grandfather, Dr. *Albert Du Fresne*, deceased. Dr. *Samuel Du Fresne*, one of the executors, agreed that he would give him the legacy coming to her, although she was under age, if he would take one-half of it in real property for her use, and the other half he would pay in cash. Some deeds were drawn by me, and executed by Dr. *Samuel Du Fresne* to that effect, and sent on to him. *He, the said Josias Stevenson, Jr. some time after came to Lancaster, perhaps in* 1829, *the time I do not exactly recollect*, and said he would be entitled to receive. *Deponent says that Josias Stevenson, Jr. told him he could not obtain that security here, but could do it if he were at home in Baltimore, and that he wondered why they, the executors, should ask it of him.* Deponent says, *he replied, that the executors were anxious to have the property secured* to *Elizabeth L. Stevenson.* Deponent says that he, *Josias Stevenson, Jr.* then replied, *if he got the cash* he *would apply the same in purchasing real property in the city of Baltimore* for *her, Elizabeth L. Stevenson's use*, and THAT IT COULD BE AS WELL SECURED THERE *as in the city of Lancaster for her.* Deponent says, that *Josias Stevenson, Jr.* remained in the city of *Lancaster*

at one time for about three days, during which time he frequently called at my office, and we had *frequently conversations to the same effect as what is detailed above.* He, *Josias Stevenson, Jr.* borrowed the acts of assembly from me in relation to the refunding bond; he said he would take them and consult his attorney in the city of *Lancaster.* He, the said *Josias Stevenson, Jr.* finally agreed to take nearly the one-half in real property in the city of *Lancaster*, transferred for the use of his wife, and the balance in cash; and on the twenty-fifth day of May, 1829, he released and discharged the executors and guardians, to wit: Dr. *Samuel Du Fresne* and *Peter Reed.* Deponent has no recollection of what took place when the money was paid, or of any conversation that took place at that time. Deponent has examined the exemplified copy of the will of Dr. *Albert Du Fresne*, deceased, being endorsed complainants' exhibit A, and believes it to be a correct copy.

4. Do you know whether or not previously to the said payment, or at the time thereof, the said *Josias Stevenson, Jr.* on his part expressly undertook and agreed to invest the amount of the said legacy in some property for the sole and separate use of the said *Elizabeth L. Stevenson*, and whether or not the said payment was not made to him upon his said undertaking and agreement, and at his solicitation. State all your knowledge of the matters inquired of fully and in detail.

To said fourth interrogatory he deposeth as follows: Deponent states, that he has no other knowledge of any undertaking or agreement of the said *Josias Stevenson, Jr.* or any other circumstances connected with the payment of the legacy to him, other than that detailed in answer to the second interrogatory. *Said Josias Stevenson, Jr. did repeatedly solicit the payment of the legacy*, and the *delay arose from the anxiety of the executors and guardians* to *secure the interest of Elizabeth L. Stevenson.* The legacy, when paid as aforesaid, was paid by her consent. Deponent has no distinct recollection of any other matters inquired of in this interrogatory, than such as

he has detailed in his answer to the second interrogatory, and in his answer given to this interrogatory.

On the application of *Edward Schriver*, alleging his marriage with *Mrs. Stevenson*, he was admitted a party to the suit, and filed the following affidavit:

Baltimore City, sct.—On this 13th day of October, 1837, before the subscriber, a justice of the peace in and for the city aforesaid, personally appeared *Edward Schriver* and *Elizabeth L. Schriver*, (formerly *Elizabeth L. Stevenson*,) which *Elizabeth L. is one of the administrators of Josias Stevenson, Jr. late of Baltimore city, deceased, and made oath, that it doth not appear from any book or writing of the said Josias Stevenson, Jr. that any part of the claim heretofore made and filed in the Orphans court of Baltimore county, by the said Elizabeth L. then Elizabeth L. Stevenson, against the estate of the said Josias Stevenson, Jr. hath been discharged, and that to the best of the several knowledge and belief of said deponents*, no part of the said claim hath been discharged, and no security or satisfaction hath been given for the same. Sworn to before, &c.

The Orphans court (HARWOOD and WARD, Judges,) decided *that the claim made by the said petitioner, against the estate of the said deceased, for the sum of nine thousand seven hundred and sixty-three dollars and four cents, with interest thereon from the 25th day of May*, 1825, *is just and legal, and ought to pass.* It is, therefore, on this 8th day of November, in the year eighteen hundred and thirty-seven, ORDERED and DECREED by the Orphans court for *Baltimore* county, that the account or claim of the said *Elizabeth*, of nine thousand seven hundred and sixty-three dollars and four cents, with interest thereon from the 25th day of May, 1825, against the estate of the said *Josias Stevenson, Jr.* deceased, *be, and the same is hereby passed by the court, and that she be allowed in her administration account for the amount of said claim, with interest as aforesaid, or her just proportion or dividend of assets in the hands of the administrators of said deceased, in case his personal estate should not be sufficient to pay all his debts.*

RIDGATE, Judge, dissented.

The creditors and distributees of *Josias Stevenson, Jr.* appealed to this court.

The cause was argued before STEPHEN, ARCHER, and DORSEY, Judges.

By SPEED, for the appellants, and
By R. JOHNSON and D. STEWART, for the appellees.

DORSEY, Judge, delivered the opinion of the court :

The first in point of order of the questions which have been discussed in this case, is, have the appellants a right to appeal from the order in question, passed by the Orphans court ?

By the first section of the act of 1818, ch. 204, a party deeming himself aggrieved by the decree, order, or decision of the Orphans court, may appeal to the court of Appeals. The term party, in this section of the act of assembly, is not used in a technical sense, necessarily importing a litigant before the court, in the proceedings in which the decree or order passed, at the time of or antecedently to its passage; but may also mean one on whose interests the decree or order has a direct tendency to operate injuriously, and who, after its passage, may appear in court and claim the privilege of appeal. Many, if not most of the orders of the Orphans court, are wholly *ex parte*, and yet the right to appeal has never been denied to him who has sustained an injury thereby.

The only inquiry, then, on this question, is, has the order before us an evident tendency to impair the rights of the appellants? We are of opinion that it has. For *argumenti gratia* conceding, as is alleged, that the passage of the claim of an executor or administrator, by the Orphans court, is not conclusive upon a distributee or creditor suing such executor or administrator, and leaves him at liberty to shew the illegality of the allowance thus made; yet it so increases the difficulty of so doing, that such an order cannot be said not to

impair the rights of a distributee, or of a creditor, where the assets of the deceased are inadequate to the payment of debts. The allowance of the claim is *prima facie* evidence of its correctness, and the executor or administrator need offer no further evidence to sustain it. The *onus probandi* is shifted from the executor or administrator to the creditor; and in most cases under circumstances, where the proof given in support of it, is wholly unknown to him, and consequently he can have no means of shewing its insufficiency. It is a proceeding *ex parte* in its nature, and of which no record is required to be kept; the only evidence of its existence is the endorsement upon the voucher, which remains with the executor or administrator, unless he gratuitously files it with the register. The executor or administrator then has nothing to do but to pass his account before the Orphans court, pocket or destroy his voucher; and the distributee has no means of impeaching the allowance made him, or disproving its correctness. From an order placing a distributee or creditor in such a condition, there surely ought to be a right of appeal.

The appellants' first point cannot be sustained. The authority of the Orphans court, in passing claims against the estate of a deceased, is not as has been contended, confined to strictly legal claims, but embraces every species of indebtedness, whether legal or equitable in its nature; nor is their power to pass accounts limited to such as are proved according to the requisitions of the act of assembly of 1785, chapter 46.

They do not derive their power of passing open accounts, as is assumed by the appellants' counsel, under the 8th section of the 9th sub ch. of the act of 1798, ch. 101, nor are their powers on that subject imperatively restricted by it. The object of that section of the testamentary system, was to restrict the authority of executors and administrators in the payment of open accounts, not passed by the Orphans court, to such as were authenticated in the mode thereby prescribed. The powers of the Orphans court in passing accounts anterior to their payment, is derived from the 2d section of the act of February session, 1777, ch. 8, and the 1st section of the 15th sub ch. of the testamentary system.

The will of *Doctor Albert Du Fresne* is inartificially drawn, and no interpretation can be given to it in reference to the question now before us, which can be regarded as free from all objection. But on collating the 2d, 3d, 4th, 5th, and 8th clauses of the will, we are of opinion that there is no such distinct and unequivocal expression of the intention of the testator, to limit the legacy to his grandaughters, to their sole and separate use, to the exclusion of the marital rights of the husband, nor such proof in the record of an agreement by *Josias Stevenson*, the deceased husband, to hold or use it as such, as could be enforced by any judicial tribunal. The intention of the testator we think is expressed in the *fifth* clause of his will, and that upon the marriage of *Elizabeth Reigart* the legacy vested absolutely in her, and that such portion of it as was received by the deceased husband during coverture, in virtue of his marital rights became his absolute property, and consequently, that the claim now preferred by his widow against his estate cannot be supported. This court will sign a decree reversing the order of the Orphans court with costs, to the appellants, both in this court and in the court below, and dismissing the appellees' petition.

DECREE REVERSED.

THE MARYLAND INSURANCE CO. *vs.* JAMES BOSLEY.
December, 1837.

Upon a policy of insurance on cargo as interest may appear—the vessel arrived at her port of destination, and delivered a part of her cargo in safety. In the progress of a regular delivery of the balance, it was partially damaged by the perils of the seas. In an action for a partial loss, *it was held*, that although the amount of the particular loss did not amount to five per centum on the whole value of the cargo shipped by the insured, still he was entitled to recover, the loss being more than *five* per cent. on the amount at risk at the time of the damage.

APPEAL from *Baltimore* county court.

THIS was an action of *Covenant*, brought on a policy of

the appellants, by which they insured the appellee to amount of $13,500, at and from *Baltimore* to *Tampico*, &c. and at and from thence back to *Baltimore*, upon cargo on board the schooner *Ned*. It contained the usual clause, that all *other* than the enumerated articles should be free from average under five per cent. unless general. The defendants pleaded that they had not broken their covenant, on which issue was joined.

At the trial of the cause the plaintiff proved that said vessel sailed from *Baltimore* for *Tampico*, laden with merchandise belonging to the plaintiff upon the voyage insured, of the cost and value of $57,740 93, and that with said merchandise on board, the said vessel arrived at *Tampico*, on or about the 15th July, 1822, and thereupon proceeded with due diligence, to discharge said merchandise, according to the usage of said port of *Tampico*, and in the only way, from the nature of the harbour, which is practicable, which is by conveying the merchandise in boats to be landed at *Tampico;* that of said merchandise, there was safely landed by the 29th July, 1822, to the amount in cost and value, as aforesaid, of $39,164 93, leaving a residue of the cargo of said *Bosley*, on board, of $18,576, in cost and value as aforesaid; that of said residue of said merchandise of said *Bosley*, there were loaded on a boat to be conveyed to *Tampico* as aforesaid, six packages, consisting of linens (of which article the whole cargo aforesaid, of said *Bosley* was composed) that said six packages were of the amount in cost and value as aforesaid, of $2,884 57; that by perils of the seas, the boat so conveying said six packages, was, while duly pursuing her course to *Tampico* aforesaid, from the vessel, upset, and the goods in said six packages thereby were damaged to the amount of $1,320 49. Whereupon, the defendants prayed the court to direct the jury that if they believe from the evidence, that the amount of particular average loss sustained by the plaintiff, on the six cases of merchandise which was damaged in the course of being landed at *Tampico*, was not to the amount of five per cent. on $57,740 93, being the whole amount of

insurable interest, as per invoice of the schooner *Ned*, mentioned in the policy, then the plaintiff is not entitled to recover, notwithstanding the jury may also believe from the evidence, that at the time of the happening of the loss, a large part of the outward cargo had been safely landed, and that there was at that time on board goods to the amount only of $18,576. The defendants, by their counsel, prayed the court further to instruct the jury, that if they believe from the evidence, that the amount of particular average loss sustained by the plaintiff on the six cases of merchandise which were damaged in the course of being landed at *Tampico*, was not to the amount of five per centum on $57,740 93, being the whole amount at risk when the policy attached, and that the voyage was in fact from *Baltimore* to *Tampico*, and back again to *Baltimore*, then the plaintiff is not entitled to recover; notwithstanding the jury may also believe, from the evidence, that at the time of the happening of the loss, a large part of the outward cargo had been safely landed, and that there was at that time on board goods to the amount of only $18,576. All which instructions the court (*Magruder, J.*) refused to give. The defendant excepted.

After this exception, the parties entered into the following agreement:

Bosley *vs.* Maryland Insurance Company. *In Baltimore County Court.* We consent to a verdict of $1,500 for the plaintiff. *Mr. John Gill* is to make a statement of the plaintiff's claim, in which he shall allow him $200, with interest from 6th May, 1823, and such amount of particular average as he may find to be due upon a calculation of loss, based upon actual average sales of sound goods, of the same kind with those damaged at *Tampico*, and such other times of computation, as are usually regarded in an estimate of particular average loss, with interest thereon from February 5th, 1825.

A verdict was accordingly taken for $1,500, and afterwards the parties filed the following statement:

"Statement of particular average on three boxes Platillas,

one box Creas a Morlaix, one box Listadoes, and one box Ronans; part of the cargo of the schooner *Ned, John Coleman*, master, damaged on a voyage from *Baltimore* to *Tampico*, on which she sailed about the ——

It is stated to me, it is admitted that the amount of the invoice of the entire cargo is . . $55,431 00

Which sum covered at a premium of 4 per cent. is equal to $57,740 00

The invoice book shews that the above damaged goods, to wit: three boxes Platillas, one box Creas a la Morlaix, one box Listadoes, and one box Ronans, cost per invoice, less debenture, $2,769 00, which covered at a premium of 4 per cent. equal to . . . 2,884 57

Sound value at *Tampico* of the goods damaged, ascertained as follows:

The sales of sound goods at *Tampico* shew, that the average gross value at that place of sound Platillas, is $15 89, pr. piece; sound Creas a la Morlaix, is $32 63, pr. piece; sound Ronans, is $30 22, pr. piece; and the proportionate sound value of Listadoes, is $13 00, pr. piece.

At which rates, the gross sound value of the goods damaged and sold at vendue, are as follows:

100 pieces	Platillas,	at $15 89,	1,589 00		
25 "	Creas,	32 63,	815 75		
25 "	Ronans,	30 22,	755 50		
50 "	Listadoes,	13 00,	650 00		
			$3,810 25	—	3,810 25
But being damaged sold only for gross, as pr. the sales thereof exhibited, ...					2,066 00
Difference, ...					$1,744 25

If $3,810 25, lose $1,744 25, what will $100 lose? answer $45, 777836 per ct. $2,884 57, at $45, 777836 per cent. equal $1,320 49.

If $57,740 00, the interest on the entire cargo, lose $1,320 49, by reason of damage, what will $13,500 00, insured by the Maryland Insurance Company lose? answer, $308 74. JOHN GILL."

BALTIMORE, 14*th November*, 1835.

A judgment was entered in conformity to this statement and the agreement before mentioned—and the defendants appealed. The exception was argued before

BUCHANAN, Ch. J. STEPHEN, DORSEY, CHAMBERS, and SPENCE, Judges.

DAVID STEWART, for the appellant:

Cited *Phillips on Ins.* 397. *The Ocean Ins. Co. vs. Carrington*, 3 *Conn. Rep.* 357, 361. 7 *Pick. R.* 259, 266. *Stev. & Ben.* 427.

GLENN and MAYER, for the appellees:

Cited *Rohl vs. Parr*, 1 *Esp. Rep.* 445. *Park*, 163. 2 *Mar.* 620. 1 *Phil. Ins.* 494. *Hughes*, 215.

By the court:

JUDGMENT AFFIRMED.

H. G. S. Key *vs.* Francis Knott and Wife.—*December*, 1837.

It is well settled that, in an action at law upon a single bill, the failure of consideration cannot be inquired into or proved.

Under the act of 1832, ch. 302, the objection that evidence is derived from hearsay, must be taken by exception in the Chancery court, and if not so taken in that court, cannot be made here.

The holder of negotiable paper, whose name is forged in the endorsation of it, does not lose his right to the money secured by it, and no title can be made through the medium of such forgery.

The circumstances stated, which excused a party from the consequence of *laches*, who had received a bank post-note, the endorsement of which had been forged, when seeking re-imbursement from the person of whom he had received it.

The rules in reference to demand and notice, applicable to promissory notes and bills of exchange, do not apply to the post-notes of a bank.

When application is made by a defendant in a court of law to the court of Chancery, for relief against the judgment, upon facts, in relation to which the proof is contradictory, it is in the discretion of the Chancery court to decide the facts, or send an issue to be tried in a court of law.

Appeal from *Chancery*.

The appellant, on the 9th August, 1832, filed his bill, alleging that the appellees had obtained a judgment at law against him for $1,100, with interest from 12th December, 1818, until paid; that the debt was contracted with *Mary Knott, dum sola;* that the judgment was founded on a *single bill* of the appellant, given for money borrowed by him of the appellee. The bill also alleged that part of the money so borrowed, was a forged note of the Bank of the United States for $500. The object of the bill was to obtain an injunction and relief, to the extent of the forged note. After the coming in of the answer, and evidence being taken, all which sufficiently appears in the arguments of counsel and opinion of this court, the chancellor, on final hearing, dissolved the injunction and dismissed the bill.

From this decree the complainant prayed an appeal, and the cause was argued on notes, before Stephen, Archer, and Dorsey, Judges.

By J. Johnson, for the appellant:

In this case a bill was filed by the appellant, on the equity side of *St. Mary's* county court, against the appellees, on the 9th of August, 1832, to be relieved in part against a judgment which the latter had obtained against him, on the 7th day of the same month and year.

The ground of the relief, as stated in the bill, is, that the single bill upon which the judgment was rendered, was given for money loaned to the appellant by one of the appellees (*Mary*) before her marriage, on the 12th of December, 1818, and that a part of the money so loaned consisted of a post-note of the Bank of the United States for $500, which has proved of no value to the appellant, from the refusal of the bank to pay the same, of which he gave notice to her.

The appellees answered the bill, insisting that the note was a good one. They subsequently filed another answer, taking other grounds of defence; but this answer was filed without asking or obtaining the leave of the court. The appellant subsequently filed a second bill, against *Francis Knott* alone, recapitulating the facts charged in the former one, and praying that *Knott* might be compelled to testify before certain commissioners, acting under a commission from *Philadelphia*, where the appellant was then prosecuting a suit against the bank upon the note.

No answer appears to have been filed to this bill, nor further proceedings had under it.

It appears from the evidence taken under the commissions, and from the answers and papers filed in the cause, that such a note as is spoken of in the complainant's bill, did constitute a part of the consideration of the sealed note on which the judgment was rendered.

That the appellant immediately parted with it, and that the persons to whom he passed it presented it for payment to the bank, which was refused. That they thereupon returned it to the appellant, who, on the 18th February, 1819, advised Mrs. *Knott* of the fact, and claiming to be credited with the amount; at the same time saying, that for her benefit he

would exert himself to have it paid, to which she did not object.

It will further appear, that the note had been stolen from the mail, and that some of the endorsements upon it were forged, which was the reason of the refusal of the bank to pay it. That the appellant caused suit to be instituted against the bank, which was decided against him on the 13th February, 1828; and that during the pendency of this suit Mrs. *Knott*, by her counsel, substantially admitted her interest in the result.

After these proceedings the cases were transmitted to the court of Chancery, there consolidated, and the chancellor, by his decree of the 26th of July, 1836, dismissed the complainant's bill.

From this decree the complainant appealed, and will contend:

1. That the note having come to the hands of the appellee *Mary*, through a forged endorsement, vested no title in her, and could vest none to the appellant to whom she passed it.

2. That the identity of the note is sufficiently established, by the pleadings and proofs.

3. That the appellees had reasonable notice of the dishonour of the note, and acquiesced in the steps which the appellant took to recover its amount; substantially admitting, in fact, that they, and not the appellant, were interested in their success.

4. That as the suit brought by *Key*, in *Philadelphia*, did not terminate until after the judgment obtained against him in *St. Mary's*, he could not have made this defence at law, even if such defence could have availed him there, in the action on his single bill.

The counsel of the appellees have been at some pains to show, that the second answer has been properly introduced in the case, and should be considered by this court in the decision of the present controversy; and for that purpose refer to the every day rule, that, that will be approved when done, which the court, upon application, would have directed to be

done. There can be no doubt of the efficacy of this rule, in cases in which it can properly be made applicable; but the appellees will have made but little progress in the attainment of their object, unless they can satisfy the court that the filing of a new or amended answer *would have been directed* by the court, if an application for that purpose had been made. If the court would not have ordered an amended answer, the argument derived from the rule adverted to, can have no application to the case.

The question then is, would the court have ordered the defendants to file an amended answer, if they had been applied to for that purpose? So far from doing so, they had no right to file such answer, unless the bill *had been amended*, and then the amended answer must be restricted to the *new* matter contained in the amended bill. Such is the express decision of this court in the case of *Thomas vs. the Visiters of Frederick County School*, 7 *Gill and John.* 369. At page 387, the court say, "It is unquestionably true, that whenever a bill is amended by the introduction of a new fact, a defendant has a right to answer such amendment, and is entitled to the benefit of his answer upon the trial of the case; *but it is equally clear, that after an answer has been filed, a defendant has no right to alter or amend it, without the leave of the court first obtained for that purpose.*"

It is manifest, therefore, that the court would *not have ordered* an amended answer to be filed; though upon application, setting forth sufficient grounds, they might have *granted leave* for that purpose.

In the case cited from 7 *Gill and John.* the right to file an amended answer, was not asserted as a privilege of the defendants, demandable *ex debito justitiæ*, but was attempted to be justified on the single ground that the bill had been amended, which it was supposed authorized the defendant to re-model the whole frame of the answer. This court, however, decided otherwise, and confined the defendant in his answer to the new matter contained in the amended bill.

So far from its being true, then, that the court would have

ordered an amended answer to be filed, it is by no means certain, that they would have *permitted* it to be done, if applied to.

In 2 *Mad. Ch. Pr.* 375, it is said, "whether an answer may be amended or not, is very much in the discretion of the court." And at page 376, the rule is said to be, "not to permit an amendment of the answer where there has been a mistake, but that the defendant must move to put in a supplemental answer, and accompany the motion with *an affidavit*, in which he must swear that when he put in the answer, he *did not know* the circumstances upon which he applies, or any other circumstances upon which he ought to have stated the fact otherwise."

In 1 *Dick. Rep.* 234, the court ordered an amended bill to be taken off the file, because it was put in without leave; and this court, in the case of *Thomas vs. the Frederick School*, say, "if this will be done, *a fortiori*, ought an answer, when so amended."

It is supposed, therefore, to be perfectly clear, that the appellees cannot have the benefit of their amended answer, and that the case is to be decided without the slightest reference to its contents.

In considering the remaining questions in the case, it should be constantly borne in mind, that the consideration of the single bill passed by *Key* to *Mrs. Knott*, and upon which the judgment was obtained, has failed to the extent of the $500, the amount of the post-note.

If, therefore, he is made to pay the whole amount of the judgment, he will unquestionably be a loser by that sum.

It is not deemed necessary to go into a critical examination of the pleadings and proofs in the case, to show that the post-note in question was passed by *Mrs. Knott* to *Key*, and that it came to the hands of the former through a forged endorsement. The appellees admit in their answer, that *Key* did receive from *Mrs. Knott* a note for $500, though they did not recollect whether it was a post-note or a bank note.

The coincidence of the amounts is a circumstance from

which the identity may be inferred; but it is submitted, that this is sufficiently established by the letter of *Key* to her, of the 18th February, 1819, written but two months and six days after the loan, which it appears by the answers was received by her, and which therefore, must have been filed in the cause by the appellees.

In this letter, he distinctly informed her, that he had taken from her such a note; of the steps he had pursued, and contemplated, for the recovery of the money; of the motives which induced him then not to return it to her; and further, that he should from that time, regard himself as acting in the matter, as her agent; advising her to consider from whom she had received it, in order that she might not be without remedy, in case his efforts should be unsuccessful.

This letter we have seen was received by *Mrs. Knott*, and it is insisted with confidence, precludes her *now* from denying, either that she did pass the note in question to *Key*; or that she was not *then* willing to credit him with its amount if the *Bank* should ultimately refuse to pay it; or, that she did not acquiesce in the steps which he proposed adopting to compel the bank to do so. If she did not mean to concur in the view of the transaction presented by this letter, it was her duty at once to have said so, in order that *Key* might, if he thought proper, contest with *Armstrong* the question of loss, as between themselves.

If all the facts contained in this letter had been asserted by *Key* in the presence of *Mrs. Knott*, without denial on her part, it would have been equivalent to her expressed assent, to their truth, and in that case, she would not now be allowed to controvert them; and it is respectfully insisted, that her receipt of the letter, and omission to deny any of its statements, is the same in legal effect as her silence would have been in the case supposed. Again, the letter from *Blackstone*, the attorney of *Mrs. Knott*, to *Broome*, of the 6th May, 1823, which was *after* the judgment against *Key*, shows clearly, that even up *to that time*, the appellees regarded the suit depending in *Philadelphia* upon the post note, as in

effect for their benefit. If not, why was that letter written? The argument that it is not evidence, is answered by the remark, that there is no exception, either to the competency of witnesses, the admissibility of evidence, or to the sufficiency of the averments of the bill, as required by the act of assembly. If such exception had been filed, his authority to write the letter, as well as his hand-writing, might have been proved.

But it is said, there is no evidence that the note came to the hands of *Mrs. Knott* through a forged endorsement. Upon this subject, the deposition of *Broome* is supposed to be conclusive, at least in the absence of exceptions to its admissibility. He states, that he was so informed by the officers of the bank, and that under that conviction they had paid the money to the person whose property it was at the time it was stolen from the mail.

The appellees' counsel say, that no notice of the dishonor of the note could have made them liable for its amount, because it had been regularly endorsed, and transferred to *Key* by delivery merely, and not having been passed for a pre-existing debt, is to be regarded as a sale, in which the purchaser takes the property at his own risk. This with submission is not the question under discussion.

The question is not whether *Key* could have made *Mrs. Knott* responsible for this note, treating her as an endorser, her name not being upon the instrument; but whether she shall be allowed to recover from him, the whole amount of an obligation given by him to her, when there has been a partial failure of the consideration. Whether in fact, to the extent of this note, he shall be made to pay for nothing. The cases cited by the counsel for the appellees, illustrative of the distinction between the *sale*, and ordinary transfer of a bill by endorsement, do not apply to this case. It may be admitted, that in the case of the sale of a bill, without the endorsement of the seller, the purchaser takes the risk of its payment upon himself; but that is, where *the names to it are genuine*, and the title consequently passes to the purchaser. But it is believed, that no case can be found where the

loss has been made to fall upon the purchaser, when *his title* to the bill purchased, has been defective. In every case of the sale of personal property, there is an implied warranty of *title*, though not of quality, and it may well be supposed, that the same principle would apply to the sale of a bill of exchange or note.

In reference to the observations and authorities, cited by the appellees' counsel to establish the distinction between bills and notes negotiated before and after having arrived at maturity, it is enough to say, that the cases in which the distinction has been recognized, were all between the holder and the previous parties to the instrument.

And it is well settled, that a holder of a bill who has become such after it has run to maturity, holds it subject to all the equities which existed against it, when in the hands of the party from whom he took it. But what have those cases to do with the present controversy? This is not an action by the holder against the drawer of the note, or against any party whose name was upon it when *Mrs. Knott* passed it to *Key*. If it were, inasmuch as it was over due when *Key* took it, there can be no doubt those previous parties might defend themselves, upon any ground which would have availed them in an action by *Mrs. Knott*.

The question here is, can *Mrs. Knott*, *the party who passed the note to Key*, compel him to pay the money for it, when she herself had no title, and could not, and did not transfer any to him. How can rules applicable to the holder, and the *previous* parties influence a case between the holder and the person with whom he immediately dealt? The equities of the *previous parties* can furnish no defence to *Mrs. Knott* in this proceeding of *Key* against her, though in a suit by him *against them*, they would be permitted to visit upon him the defects of her own title before she parted with the note

The remaining questions are: whether conceding that the note is to be regarded as a bill of exchange, and that *Mrs. Knott* was entitled to reasonable notice of its dishonour, she is not still so far liable as to have the amount of it deducted

from the obligation given her by *Key*. She passed it to *Key* on the 12th of December, 1818, and was apprised by him of its dishonour on the 18th February, 1819, two months and six days after, his letter to her of that date. In this letter he distinctly informs her, that payment of the note has been refused, and that he holds it on her account, and expects and claims to be entitled to a credit on his single bill for its amount. No answer is returned by her to this letter, but on the contrary she acquiesces in it, thereby admitting, and tacitly engaging to be answerable for the amount of the note. Her silence after the receipt of that letter, was tantamount to an express promise to *Key* to credit him with the $500. It was admitting her liability for the amount. If, therefore, *Key* had neglected to give notice in time, she would still, upon the strength of such promise, be responsible for the amount of the note. *Byles on Bills*, 171. 16 *Law Lib.* 105. And such would be the case even if she was under a misapprehension of the law. *Ib.*

It is denied, however, that paper of the description now spoken of, is subject to the rules which govern ordinary negotiable instruments. Such notes enter into the general circulation of the country *as money*, and are treated as such by all who receive them. It would be productive of the most serious inconvenience, if the courts were to make it necessary, that every person who receives a bank post note should present it for payment within the time required in reference to bills of exchange, under the penalty of losing his remedy against the party who passed it to him, if it should for any cause be dishonoured.

That such is not the rule is proved by the passage in *Chitty on Bills*, 421, referred to in the opening argument.

If there is any force in the argument of the appellees' counsel, that *Key* should have returned the note to *Mrs. Knott*, when he informed her of its dishonour; it is obviated by the fact, that she *acquiesced* in his keeping it, and in the steps which he proposed taking to recover the money upon it for her benefit.

The last question refers to the obligation of the appellant to have made the defence now insisted upon by him, in the action at law, and the case of *Gott & Wilson vs. Carr*, 6 *Gill and John.* 309, is referred to for the purpose of showing that such a defence might have been made at law. But is this so? The ground relied upon, is not that a *fraud* was committed by the appellees, as was the case in *Gott & Wilson vs. Carr*, and which might be taken advantage of at law, in an action upon a sealed note, but that a part of the consideration of the specialty given by *Key* to *Knott* had failed; and no rule is better settled than at law, the consideration of an instrument under seal cannot be inquired into.

But independently of this, it was impossible for *Key* to make the defence now urged in the action at law, for the simple reason, that at the time the judgment at law against him was rendered, the suit which he had instituted against the *Bank* had not been determined, and of course it could not have been known whether the money would be recovered from the *Bank* or not. The judgment against *Key* was rendered at August term, 1822, and the suit against the *Bank* was not decided until the year 1828. The county court which rendered the judgment against *Key* could not have given him a credit for the $500, the amount of the post note, when for aught then known, he might recover the same sum from the *Bank*, in which event he would have been paid twice.

Upon the whole it is submitted, that the clear justice of the case is with the appellant, and that there is no rule of law which can prevent this court from granting him the relief he prays by his bill.

Tuck, for the appellees:

This is an appeal from a decree of the chancellor. The bill was filed in *St. Mary's* county court, as a court of equity, for an injunction against an executor on a judgment against the appellant by the appellees. The equity, as stated in the bill, is, that the single bill on which the judgment was

obtained, was given for money borrowed by the said *Key* from the defendant, *Mary*, before her marriage, and that part of the consideration was a post note of the *Bank of the United States* for $500, which was protested on being presented at the *Bank* for payment, which was entirely without value to the appellant. And that the said *Mary* had notice thereof. That he prosecuted his claim against the *Bank* on the said note, and the cause was pending at the time of filing his bill of complaint.

The answer admits that the note was given for money borrowed, and insists that the bank notes were all good and current. They afterwards filed another answer, and the complainant took issue by general replication. In this answer they admit the judgment, and single bill, and that it was given for borrowed money. But they say they are ignorant if the said note for $500 was a counterfeit—nor are they aware of any objections that could be raised by the *Bank* against it. They received it, and paid it to the complainant as good money, and they do not know that the same was a post note; they insist that the note was not returned to them by the said *Key*, or any notice of his difficulty in using it, given within reasonable time, as he ought to have done on discovering that any of them would not be taken at *Bank*, and that they are not aware of, nor bound by any steps which he may have taken to recover the amount from the *Bank*.

A bill was afterwards filed against *Francis Knott* alone, by the complainant, reciting the contents of his former bill, and praying that the defendant may be compelled to appear and testify, under a commission from *Philadelphia*, where he was prosecuting the recovery of the amount of said post note from the *Bank of the United States*. No proceedings appear to have taken place under this bill. On the 3d May, 1830, exceptions were filed by the complainant to the answers of the defendants. No order appears to have been passed in relation to the exceptions—and on the 6th January, 1831, commmissions issued to take proof, which was taken, and

the proceedings afterwards, on the 7th March, 1833, transmitted to the High Court of Chancery—and from the chancellor's decree, dismissing both bills of complaint, this appeal is taken. The appellees will contend:

1. That it does not appear from the proceedings in the cause, that the said *Mary Knott* ever did pay to the said appellant, a post note of the *United States Bank;* nor that the same if passed to him, ever came to her hands by means of a forged endorsement.

2. That it does not appear that the note on which the appellant sued the *Bank*, was the same note which he had received from the said *Mary.*

3. That the appellees had not due and reasonable notice of the non-payment of the said note by the said *Bank*—and even if the prosecution of the *Bank* by the appellant, as a *bona fide* holder of said note, could affect the appellees at all, it cannot in this case, because he did not use reasonable diligence in prosecuting said claim.

4. That if the appellant ever had any defence to any part of the claim of the appellees, on said single bill, he ought to have made the same at law, in bar of the said judgment, and cannot now be relieved in equity—and the defence he now sets up, was such a one as he might have made at law.

Before noticing the points filed by the parties, it is proposed to submit a few remarks on the admissibility of the second answer filed by the defendants in the court below. The appellant contends that it ought not to be received, because it does not appear to have been filed after leave granted in the usual form. It is a familiar rule in equity, that the court will approve when done, that which they would have permitted or directed to be done. It is their object to do substantial justice between the parties, and they will not closely examine and entertain technical objections to proceedings, merely because the rules of practice have not been rigidly complied with; more especially in equity, where pleadings are less strictly and formally conducted than at law. *Lee, et al vs. Stone, et al*, 5 *Gill and John.* 19. There

is nothing in the record to show that the amended answer was not regularly filed—and the court will not presume that the register has filed it contrary to the practice of the court. But it is not competent for *Key* now to object that this second answer is irregularly on file, and therefore, to be disregarded by the court. The record will show that exceptions were taken to the *answers* after the second one was filed. It does not appear what order, if any, was had on them; but as they emanated from the appellant, it is not the fault of the defendants if they were abandoned by the appellants, or over-ruled by the court. Whether they shared the one fate or the other, they equally recognized the propriety with which the answer in question appeared on the file. A general replication was subsequently entered, and commissions issued to take proof at the instance of the complainant. This also precludes any objection to the answer at this time, for irregularity. At law, if there be any irregularity in conducting a cause, the opposite side must object at once—and if he takes a single step on his own part, the defect is waived. If a plea of limitations (not to the merits) be filed *after* the plea day, and issue be joined, the plaintiff cannot object that the plea came too late. 3 *Chitty's Practice*, 509, 513. *Bayley's Practice*, (288) *in the* 15*th volume Law Library.*

In equity also, the same rule obtains. "If new matter be stated by way of amendment, which ought to have been made the subject of a supplemental bill, and the defendant answer the amended bill, it is too late to object to the irregularity at the hearing." 2 *Mad. Ch.* 374, 375. "No exceptions can be regularly taken to an answer after replication put in, for by the replication it is admitted sufficient; yet in some cases, the court has ordered the replication to be taken off the file, and suffered exceptions to be put in." 1 *Har. Ch. Pr.* 320. From these rules at law and equity, it may be asserted, that the objection by the complainant to the second answer, is too late. The irregularity, if any, in its reception by the clerk, is waived, by the filing of exceptions, and a replication. At the proper time, before any step on his own part, he ought to

have entered a motion, "*ne recipiatur*," when alone the court could have rejected it.

But it is submitted, that the rejection of the answer in question, cannot avail the appellant, because the first answer, however defective or irresponsive it may be, puts in issue the allegations in the bill, and the complainant must sustain them by proof. If defective, the complainant might have excepted, and if sustained in his exceptions, the court would have ordered an answer over. Upon the authorities above mentioned, the replication admits the sufficiency of the answer, and the bill must be proved as fully, as if all its statements were denied. *Joice and wife vs. Taylor*, 6 *Gill and John.* 58, 59.

The points filed by the appellees, and upon which the merits of the case are presented, are little more than denials of the propositions stated in those of the appellant. The appellees contend that the chancellor's decree ought to be affirmed. 1st. Because it does not appear, that *Mary Knott* ever did pass a post note to the appellant—or, that the same, if passed to him, came to her hands by a forged endorsement. In other words, the title of *Mary Knott* to the said note, is not disproved, so as to deprive her of the power of assigning it to the appellant. This point may be considered with the 2d, because, it does not appear that the note sued on in *Philadelphia* by the appellant, was the same one that he received from the said *Mary Knott.*

The appellant to recover, must establish the facts controverted in these points. There is no admission in the answer of the identity of the note—indeed, the defendants disclaim any knowledge whether they ever gave *Key* a *post note.* They do not know whether it was a post note or a bank note, or whether any endorsement thereon was forged. The testimony is altogether hearsay—derived from the officers of the *Bank*—that a note *which Broome presented for payment* was stolen from the mail, and afterwards put in circulation with a forged endorsement. The loan was made to *Key* by the appellee, *Mary Knott*, on the 12th December, 1818. On the 14th September, 1819, *Broome* received *a post note* from *Key*

for collection. This is all the testimony from which the court are asked to infer that *Key* received this *post note* from the defendant, and that he sent the *same* note to *Broome*.

3d Point.—There is no evidence that the defendants had reasonable notice of the dishonour of the note, or acquiesced in the steps taken by the appellant to recover its amount, substantially admitting that they had any interest in the "suit in *Philadelphia*." There is no proof of any demand on the *Bank* for payment of the note until after September, 1819. The allegation of *Key*, that he passed the note to *Armstrong*, who sent it to the *Bank* is not sufficient proof of a demand. Why was not *Armstrong* examined to prove the time and circumstances of the demand? And if the demand was not made until after *Broome* received the note, we submit that a presentation after nine months is not within reasonable time. The letter from *Blackstone*, contained in *Broome's* testimony, is no evidence against the appellees, even if such a letter was written—and the hand-writing of *Blackstone* is not proved—because his authority as attorney in this case, did not extend to any control over the case of *Key vs.* the *Bank*, in which he was not counsel. It does not appear from the testimony of *Blackstone*, that he was specially authorized to write such a letter, and in the absence of proof we must suppose that it was done without authority. But the letter of *Blackstone* proves too much. It proves the genuineness of the note, because it contains *Key's* own admissions that the *Bank* acknowledged that the note was a good one. If the note was good there could have been no forgery in its inception or endorsement, and therefore the *Bank* was bound to pay it. In that case he could have made no defence to the action at law of the appellees against him—because he had not received a spurious note—and if the note was good, as the *Bank* admitted, his suit could not have failed against the *Bank* under ordinary diligence in conducting it. The letter being introduced by the appellant's witness, must be taken altogether, or entirely rejected. But it is insisted on our part that no notice of the dishonour of the note could have fixed

on the appellees any liability to pay it. This was a post note, payable to *order* and regularly endorsed by the payee, and transferred to *Key* by delivery only, after it had become due. It is not a bank note, but on its face purports to be a bill of exchange, though *sui generis*. The court will recollect that these notes were put in circulation by the *Bank* with great diffidence of their right under the charter to do so. If they had been or ever were considered as bank paper, there could have been no difficulty in issuing them. Though they were intended to supply the place of bank notes to some extent, and perform the office of *currency*, yet the nature and character of them is not changed, and they must be regarded as other bills, and treated in all respects as negotiable paper, and not as money. If the note had been endorsed by *Mrs. Knott* she would have been entitled to the same notice that the law allows to endorsers in all cases. A delay beyond the first mail is not considered reasonable notice to an endorser; but in this case, upon *Key's* own shewing, she had no notice until some time in February, after he had received the note from her, and when, perhaps she had by his delay, lost all opportunity of recovering the amount from her assignor. There is no allegation or proof that she knew at the time of the delivery, that the note was of no value, and the court must presume the transaction to have been *bona fide.* A distinction is made in the books between a transfer by delivery *in payment* of a pre-existing debt—and such a transfer (as in the present case) in exchange for goods, money, or other bills or securities. In the former case, if the bills turn out of no value, the transferrer is liable on the consideration of the debt, and not on the instrument, *unless the transferrer has made the note his own by laches.* In the latter cases, the transaction is held to be a sale of the bill by the transferrer, and the purchaser takes it with all risks. Upon this principle, if a party discounts bills, and receives in part other bills, not endorsed, and they turn out to be bad, the party making the transfer is discharged. Taking them without endorsement, he takes the risk on himself. In this case *Knott*

took *Key's* sealed note, on interest, instead of deducting discount, and passed this bill on the *Bank* in part of the amount. There is no real difference in the cases. *Fydell vs. Clark*, 1 *Esp.* 446. *Bank of England vs. Newman*, 1 *Ld. Ray.* 442. *Emly vs. Lye*, 15 *East.* 7. *Fenn vs. Harrison*, 3 *T. R.* 759. *Ex parte Shuttleworth*, 3 *Vez.* 368. *Ward vs. Evans*, 2 *Ld. Ray.* 928.

There is also a material distinction between a transfer made *before* a bill is due, and one made *after* that time. In the first case, the transfer carries no suspicion on the face of it, and the assignee receives it on its own intrinsic merit—nor is he bound to inquire into any circumstances existing between the assignor and any of the previous parties to the bill. See 3 *Tem. Rep.* 82. But when it is made after it becomes due, whether by endorsement or mere delivery, it is settled that at least it may be left to the jury, in cases at law, upon the slightest circumstance, to presume that the assignee was acquainted with, or had notice of the circumstances which could have affected the validity of the bill. 3 *Term Rep.* 80. *Camp.* 19. *Johnson vs. Bloodgood*, 2 *Caine's Cases in Error*, 303. The cases upon these points are collected in *Byles on Bills*, 16 *vol. Law Library*, *pages* 91 *to* 97.

But conceding that reasonable notice would make the defendants liable, is there any proof of such notice as, under all the circumstances, they ought to have received? Further, must not the notice in such cases be accompanied by the note itself? *Key* says he informed *Mrs. Knott* in February, 1819, of the non-payment of the note. Of what avail was it to her to be informed of this fact, unless she had also at the same time the note itself to present, and return to the person from whom she received it. It is not necessary to return a note to an endorser when notice of dishonour is given, because the property is in the holder, and the design of notice is to afford the endorser an opportunity of securing his funds in the hands of the person on whom the bill is drawn, and the possession of the bill is not necessary to this object. But in the case at bar, *Mrs. Knott* could not have claimed the amount of the

note from her transferer, unless she went prepared to place him in the same situation, by the possession of the note, that he was in at the time she received it; and this she could not do, because *Key*, instead of returning the note, undertakes the collection of it, by sending it to *Philadelphia*. But *Mr. Key* has not used diligence in prosecuting the claim in *Philadelphia*, even supposing that the defendants can be affected by his acts in that respect. The note was not sent on until September, 1819, and the suit was not commenced until 1822, and not decided until 1828; and as he himself states in the bill, the delay was caused in part by his not being able to procure counsel on terms that he thought reasonable. If he chose to assume the responsibility of acting for *Mrs. Knott*, he should have prosecuted carefully and diligently, and he cannot now avail himself of his own neglect. Upon this last point then, we contend, that *Key* should have given notice within a shorter time, accompanied by the note itself; and having failed in this, and assuming on himself the duty of commencing suit without the knowledge or consent of the defendants, he must abide the consequences. It is said by the appellant's counsel, that he informed *Mrs. Knott* that he had deliver the note to *Armstrong*, and if she had intended to resist his defence to the single bill, she should have given him notice of that design, that he might have recovered the note from *Armstrong* and tendered it to her. It surely was no part of her duty to give him any such notice, because, as before said, it was his own fault that he was in a situation to need it. He had no business to retain possession of the note after its dishonour, if he intended to claim the amount from her. His duty was to have returned the note immediately; by keeping it as long as he did, and attempting to collect it, he has made it his own, and cannot now complain of his own *laches*. *Ward vs. Evans* 2 *Ld. Raymond*, 928, 930. There is no evidence that *Key* ever considered the note valueless, until he sent it to *Broome* in September, 1819; and then he did not give any notice thereof to *Mrs. Knott*. In his letter to *Mrs. Knott*, February, 1819, he puts his objection on the ground that the

endorsement could not be deciphered, and expressly asserts that the bank did not protest the note as void, and this accords with *Blackstone's* statement of *Key's* admission to him. Now if the illegible character of the endorsement was the only ground of objection, *Key* either knew the fact when he took the note, or the names were effaced while in his possession. In either event he cannot charge *Mrs. Knott.* All the facts and circumstances of the case, bring it within the principle of those authorities, which declare that a transferee by *laches* may make a note his own, as stated in *Byles on Bills*, referred to above. The proper test is, whether the chances of *Mrs. Knott's* recovering the amount from her transferer have been prejudiced, by the failure of *Key* to return the note? If so, he must bear the loss. In point of fact, the note never has been in her possession since December, 1818.

4th Point.—That if the appellant ever had any defence to the action at law on the single bill, he ought to have made the same in the county court, and cannot be relieved here, because the defence now set up, if sustainable at all, might have been presented in the county court. It is competent for a court of law to inquire into the consideration of a sealed instrument. Where fraud is suggested, or any other defence made, under the plea of *non est factum*, in bar of the action, the court are authorized to grant relief. This is the law of England and of this country, independently of decisions in the States. But this court have settled the principle in *Gott and Wilson vs. Carr*, 6 *Gill and John.* 309.

The points relied upon are not contrary to the act of 1832, nor is it necessary to disregard the provisions of that act to sustain them.

Stephen, Judge, delivered the opinion of the court:

We think that the decree in this case is erroneous, and ought to be reversed. The complainant against whom the judgment was obtained at law, not being able to make his defence before that tribunal, was clearly warranted in appealing to the remedial powers of a court of equity for that relief,

which he could not obtain in a court of common law jurisdiction. The action in which the judgment was rendered, was instituted upon a single bill, and the principle is uncontrovertible, that the failure of consideration upon which the defence was founded, could not have been inquired into, or proved, upon the trial of the case in a court of law. The single bill which constituted the cause of action, was given for the repayment of a sum of money loaned by the plaintiff to the defendant in that suit; there was no allegation of fraud or illegality in the transaction, but a part of the money which formed the consideration of the single bill was a post-note of the Bank of the United States, to which the plaintiff had no title at the time it was loaned to the defendant, it having been stolen out of the mail, and put into circulation by a forged endorsement of the name of the true owner. Upon being satisfied of these facts, the bank paid the amount of the note to the parties who were the legal holders at the time the theft was committed, and of course refused to pay it a second time, upon presentation by the party into whose hands it had passed since the forged endorsement. These facts are proved by the testimony of *James M. Broome, Esq.* to whom the note was transmitted by the appellant, for the purpose of instituting suit against the Bank of the United States for its recovery, after the payment of it had been refused by that institution.

Under the provisions of the act of 1832, the whole of *Mr. Broome's* testimony is admissible, no exceptions being taken to it in the court below; therefore the objection that a part of it is hearsay, derived from the officers of the bank, cannot now be raised.

That the holder of negotiable paper, whose name is forged in the endorsation of it, does not thereby lose his right to the money, and that no title can be made through the medium of such a forgery, is a proposition too well established to admit of controversy. If for such a principle authority be necessary, it may be found in *4th Term Rep.* 32, where *Mr. Justice Grose*, after stating that no person but the payee, or the person authorized by him, can demand payment of a bill

of exchange payable to order, says, "if this decision will prove a clog on the circulation of bills of exchange, I think it will be less detrimental to the public, than permitting persons to recover through the medium of a forgery." To the same effect see *Byles on Bills of Exchange*, 113, where he says, "if the acceptor or maker pay one who derives his title through a forgery, that will not discharge him." In 13 *Wendell Rep.* 101, it is said, "that payment in the bills of an insolvent bank is not a satisfaction of a debt, although at the time and place of payment the bills are in full credit, and the parties to the transaction are wholly ignorant of such insolvency. If previous to such payment the bank has in fact become insolvent, the money must be lost in the hands of him who held it when the bank failed." For the same principle see 2 *John. Rep.* 455, where the court say, that a counterfeit or forged note of a bank, is no payment for goods sold and delivered, although both parties were equally ignorant of the forgery at the time the payment was made. The note paid away in this case, which proved to be a counterfeit, was a note of fifty dollars, purporting to be a note of the Boston Branch Bank of the United States.

The appellant, therefore, was clearly entitled to a credit upon his single bill for the note of five hundred dollars, unless he has forfeited his right to such credit, or made the loss his own, by some act or *laches* on his part, which would operate as a bar to such claim. It appears by the proof in the cause, that the appellant on receiving this note from the appellee, immediately paid it away in the course of his dealings, with two persons of the name of *Armstrong*, by whom it was returned to him, on payment being refused by the bank. The single bill which was given for the money loaned, was executed on the 12th of December, 1818, and it appears by a letter of the appellant, filed as testimony by the appellees, that notice was given to the lender on the 18th of February, 1818, that the note had been presented at bank for payment, and that the bank had refused to pay. In this letter, the lender of the money is informed, that the appellant claimed a credit

for the note, not considering it to be his loss, and his services are tendered to her to endeavour to get the money from the bank, as her agent. To this letter it does not appear that any answer was returned, but the silence of the party to whom it was written may, we think, be fairly construed as a tacit acquiescence in the proposition therein contained. *Qui tacet consentire videtur; qui potest et debet vetere, jubet.* In support of this principle see 4 *Dallas*, 134, where the court, in speaking of letters of credit, say, it is not necessary that they should be answered if credit is given upon them; like the case of transmitting a bond in a letter, acquiescence and acceptance are implied in the silent receipt of the instrument. Not only is there proof of acquiescence and assent by her silence, but it appears by a letter written by her counsel at a subsequent period, that she recognized the complainant as her agent in the steps taken by him to recover the money from the bank. The letter here alluded to, was the one written by *Thomas Blackstone* to *James M. Broome*, whom the appellant had employed to institute a suit against the Bank of the United States, for the recovery of the money claimed to be due upon the note. In that letter, it appears, that she considered the suit as instituted for her benefit. *Blackstone* states himself to be counsel of the person who loaned the note in question to *Key*, the appellant, and asks of *Broome* to be informed of the state of the suit, and all the circumstances relative to it, as soon as he could make it convenient. If this suit was not instituted with the consent and approbation of the appellee, if she felt no interest in the prosecution or termination of it, if she intended to hold *Key* responsible, no matter what the issue of it might be, and intended to rely solely upon her bond as the evidence of her claim, it is difficult to conceive a motive which could have prompted such an inquiry. This letter, too, was written shortly after the recovery of the judgment at law, and pending the suit in equity for an injunction and relief against it; and affords a pretty strong commentary upon the state and conviction of her own mind, as to the justice and equity of the complainant's pretensions in that suit.

No objection being taken to the admissibility of this letter, as evidence in the court below, it is too late to except to its legality as testimony in this court. The note in this case being a bank note, which is a common medium of exchange, and circulates from hand to hand as money, the rules as to demand and notice applicable to bills of exchange and promissory notes, do not, we think, apply. The establishment of such a principle would go far to impede, if not to destroy their circulation as a common currency, and would be productive of great inconvenience to the public generally, and to the mercantile community in particular; the objection, therefore, founded upon the want of timely notice of dishonour, is not we think sustained.

In cases of this description, the jurisdiction of a court of Chancery is two-fold, and embraces the powers of both court and jury, and even where the testimony is conflicting and contradictory, a resort to a court of law for the decision of a jury, rests in sound discretion, and is not necessary if the conscience of the chancellor can be satisfied without it. If authority be deemed necessary for so plain a principle, it may be found in 1 *Hen. and Munford*, 91 *and* 372. Upon the whole, we think that the suit against the bank, having terminated unfavourably to the plaintiff, the complainant in the court below was entitled to equitable relief against the judgment at law, obtained against him in *St. Mary's* county court, so far as the same embraced a recovery of the plaintiff's claim for the post note of $500 loaned by the plaintiff to the defendant, and that he ought to be credited with the amount of that note, and interest thereon from the time he was chargeable with interest for the money loaned, according to the terms of his obligation to the appellee; and as he was forced into equity to obtain relief against the judgment at law recovered against him, in justice he is also entitled to his costs incurred in the court of Chancery. Upon these principles we think that the rights of the parties will be equitably adjusted, and this court will sign a decree accordingly.

DECREE REVERSED.

The Regents of the University of Maryland *vs.* Joseph B. Williams.—*June*, 1838.

A corporation may be *private*, and yet the act, or charter of incorporation, contain provisions of a purely public character, introduced solely for the public good, and as a general police regulation of the state.

If the acts of 1807, ch. 53, and 1812, ch. 159, by conferring authority to grant diplomas, may be regarded as repealing so much of the act of 1798, ch. 105, as provides for the payment of $10 for a license to practise, and imposes a fine for practising without license, and are therefore in violation of the rights conferred by the latter act; they are not for that reason wholly unconstitutional and void, but only so far as the authority to grant diplomas extends.

But the right to grant license to practise, for a fee, and to a portion of the penalty for practising without license, given to the Medical and Chirurgical Faculty, by the act of 1798, ch. 105, is not such an inviolable vested right, as to be beyond the reach of the legislature.

The act of 1798, in that respect, is penal and sanatory, looking to the health, and lives of the citizen, and as such might be revoked at the pleasure of the legislature.

The power in question is a political one, and in granting it to the corporation, the good of the public was the object contemplated, not the regulation, or promotion of private interests.

A corporation aggregate, is an artificial intellectual being, composed generally of persons in their natural capacity, but it may also be composed of persons in their political capacity, of members of other corporations.

The corporation of "The Regents of the College of Medicine of Maryland," created by the act of 1807, ch. 53, is not destroyed or merged in the corporation of "The Regents of the University of Maryland," created by the act of 1812, ch. 159, independently of the constitution of the United States, or of the bill of rights, and constitution of this state.

They exist as distinct and independent corporations, in possession of all the rights and franchises conferred upon them respectively, by the acts of their incorporation; those rights and franchises, being entirely compatible, and the powers and authority of the one, not inconsistent with, or opposed to the powers and authority of the other.

The corporation of "The Regents of the University" is a private, and not a public corporation.

It was not created for political purposes, nor invested with political powers.

If a corporation be eleemosynary, and private at first, no subsequent endowment of it by the state can change its character.

It is not sufficient to render a corporation public, that its ends are public.

Whether a corporation be public or private, depends upon the nature of the franchises granted, and not the expected beneficial results to the community, from the possession and exercise of those franchises.

Public corporations are to be governed according to the laws of the land, and the government has the sole right as trustee, to inspect, regulate, and control them, whilst the same right, in reference to private corporations, appertains to the visitors alone, under the visitatorial power incident to such corporations.

Colleges and academies, established for the promotion of piety and learning, and endowed with property by public and private donations, are, in a legal sense, equally with hospitals for the relief of the poor, sick, &c. considered as private eleemosynary corporations. A charter, or act of incorporation, when accepted, is a contract, protected by that clause of the constitution of the United States, which declares, that "no state shall pass any law impairing the obligation of contracts."

The act, therefore, incorporating "The Regents of the University," having been accepted, constituted a contract, protected by the constitution of the United States, and the act of 1825, ch. 190, impairing the obligation of that contract, is repugnant to that instrument, and consequently void.

And independently of the constitution of the United States, and of this state, that act is void as opposed to the fundamental principles of right and justice, inherent in the nature and spirit of the social compact.

The legislature has no right, without the consent of a corporation, to revoke or alter its charter, or take from it any of its franchises or property; not that a corporation is clothed with any peculiar sanctity, but because its property and franchises *are private property*, and under the safe-guard of the same principle, that protects the property and rights of individuals.

The act of 1825, professes to discontinue and abolish the corporation of the Regents of the University, and to appoint a board of trustees composed of different persons, and to transfer to them all the franchises and property of the corporation intended to be abolished. In this respect, if effectual, it would amount to a legislative ouster; a legislative judgment of dissolution, and as such in opposition to the 6th article of the bill of rights, which declares, "that the legislative, executive, and judicial powers of the government, ought to be forever separate and distinct from each other,"—and also to the 21st article of the same instrument, declaring "that no freeman ought to be taken, or imprisoned, or disseized of his freehold, &c. but by the judgment of his peers, or by the law of the land."

An act which only affects, or exhausts itself upon a particular person, or his rights and privileges, and has no relation to the community in general, is rather a sentence than a law.

It may be questioned whether an unconstitutional act of the legislature can be made constitutional and valid, by a subsequent acquiescence in it.

It is not necessary to the constitutionality of an act for altering a charter, to the passing of which, previous assent has not been given, that it should by its *terms*, be made to depend upon subsequent assent.

The passing of it, with nothing more, amounts to an offer only for acceptance, and if afterwards accepted, either expressly, or by acting under it, it then receives life, and becomes an operative law.

But the acts, from which the assent of an existing corporation, to an alteration of its charter, may, and can alone be inferred, must be corporate acts, or

acts of its authorized agents, or officers. The acts, or declarations of particular members, do not bind the corporation.

Nor can the assent of a corporation to an act, altering, or destroying its charter, be inferred from the fact, that individual members, accepted, and held offices under the new corporation, which it was the object of the act to create.

Neither non-user or mis-user, of corporate franchises, has ever been held sufficient to authorize the granting the same franchises to others, before a forfeiture has been judicially declared.

An inference of assent by a corporation to an act of assembly after it has been passed, can no more be drawn from a subsequent non-user, or misuser of its franchises, than an inference of consent to its being passed, can be drawn from a previous non-user or mis-user.

Nor can the non-user by a corporation of its franchises, be considered as equivalent to a surrender of them—that can only be done by deed to the state.

Neither are courts warranted in presuming a surrender of the corporate rights, and a dissolution of the corporation, from a mere intentional abandonment of the franchises, unless there be something in the act of incorporation to justify it.

If either of the faculties of a corporation consisting of integral parts, is lost, and not restored at the time of bringing a suit by such corporation, the action cannot be maintained.

But the acceptance of office by the members of one of the faculties of an old, under a new corporation, does not in law amount to a resignation of their offices under the former, nor to a dissolution, or suspension of its franchises.

An office in a corporation may be resigned in two ways; by an express agreement between the officer and the corporation, or by an agreement implied from his being elected to another office *in the same corporation*, incompatible with it—and such resignation is not complete until the corporation shall have manifested its acceptance of the offer to resign, either by an entry in its books, or electing another person to fill the place, treating it as vacant.

When the fact of incorporation is shown by the plaintiff, the burden of showing a dissolution is thrown upon the defendant.

A corporation cannot be considered as being composed of distinct, definite, integral parts, unless the number of the members of each class is definite, and a majority of the members of each, is necessary to constitute a corporate meeting or assembly. No advantage can be taken of any non-user or mis-user on the part of a corporation, by any defendant, in any collateral action.

There are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter. The one by *scire facias* when there is a *legally* existing body capable of acting, but who have abused their power; the other by information in nature of a *quo warranto*, which applies where there is a corporate body, *de facto* only, who take upon themselves to act, though from some defect in their constitution, or organization, they cannot legally exercise their powers. And the proceedings in both cases must be at the instance of the government, and in no other way.

The defendant, the treasurer of the trustees of the University, was held liable to the corporation of the Regents, in an action for money had and received, for any money to which, as Regents, they could shew themselves entitled, amounting to a sum within the jurisdiction of the court, remaining in the hands of the defendant at the time the suit was brought, and which was received by him, as such treasurer, at any time within the three antecedent years. The act of limitations relied on by the defendant, barring a recovery for previous receipts.

APPEAL from *Baltimore* county court.

THIS was an action of *assumpsit*, instituted by consent to December, 1837. The plaintiffs counted for money had and received to their use, and the defendant pleaded the general issue and limitations. On these pleas issues were joined.

It was agreed that either party shall be at liberty to have considered as offered in evidence in the case, any certified copies, by the proper keeper, of any original papers laid before the legislature, or any branch of it, relative to the University, from the year 1807 to the present time, to have the same effect and operation, and no other, as if said papers were actually produced at the trial, and open to all exceptions to which the same would be liable if so actually produced; and that the record or minute-book of the proceedings of the *Trustees of the University of Maryland*, offered in evidence by the defendant, and the record or minute-book of the Board of *Regents of the University of Maryland*, excepting the list of alleged donations at the end of the same, offered in evidence by the plaintiffs, or any part of either of said record books, may be read and used in the Court of Appeals on the trial of this case before said court, as if the same had been incorporated at large in the statement in the record of the evidence offered by the parties, and in like manner, that the diploma offered in evidence may be read from the original paper in the Court of Appeals. And it is further agreed, that all the evidence offered by either party shall be open to all exceptions in the Court of Appeals, in the same manner as if exceptions to the same had been taken to the same as offered. And it is also agreed, that any act of assembly, public or private, may be read from the statute book on said trial.

At the trial of the cause the plaintiffs, to prove the issue on their part, offered in evidence the act of the general assembly of Maryland, passed at November session of the year 1807, chapter 53, entitled, "An act for founding a College of Medicine in the city or precincts of *Baltimore*, for the instruction of students in the different branches of medicine," which, it was agreed, might be read from the printed statute book. And also offered in evidence, the petition upon which said act was passed.

And further, the plaintiffs offered in evidence, the act of the general assembly of Maryland, passed at November session of the year 1812, chapter 159, entitled, "An act for founding a University in the city or precincts of *Baltimore*, by the name of the University of Maryland;" and also offered in evidence the petition upon which the said act was passed. And also offered in evidence, the votes and proceedings of the house of delegates and senate of the general assembly of Maryland, of the sessions aforesaid, of the years 1807 and 1812, which, together with the last mentioned act of assembly, it was agreed might be read from the printed publication. And the plaintiffs further offered in evidence, the minute-book of the Regents of the University of Maryland, excepting, however, the entry or statement therein in relation to donations, which it was agreed should not be inserted in the record, but that the original book might be used at the hearing of this cause. And the plaintiffs, further to prove the issue on their part, read in evidence the first section of the act of said general assembly of Maryland, passed at November session, 1803, chapter 92, which it was agreed should be read from the printed statute book. And they further offered in evidence, that the said persons, claiming to be the corporation of "the Regents of the University of Maryland," entered upon and prosecuted the business and purposes of said corporation, and that lectures were delivered, and courses of instruction in medicine and law, and in the other faculties, were given regularly and constantly, by professors appointed under the act aforesaid, creating the corporation aforesaid, of "the Regents

of the University of Maryland," and that degrees from time to time, were conferred, as authorized by said act. And further offered in evidence, that the professors of the faculty of physic and the professors of law, of the said University, at an early period after the passage of the said last mentioned act, and before the year 1826, incurred at various times large personal responsibility, which is mentioned in the deeds given in evidence by the defendant, and which was discharged in the manner mentioned in said deeds by the trustees. And the plaintiffs further offered in evidence, that from time to time, after the corporation aforesaid went into operation under the act aforesaid, of the session of the year 1812, chapter 159, and before the year 1826, donations were made to the said corporation, for the uses and purposes thereof, of minerals and books, of the value of two thousand dollars. And the plaintiffs further offered in evidence, the act of the general assembly of Maryland, of December session, of the year 1821, chapter 88, entitled "An act relating to the University of Maryland," which, by agreement, may be read from the printed statute book. And also offered in evidence, that in pursuance of said act, the medical professors of the University of Maryland, entered into bonds for the interest, and paid the said interest from year to year, required of them by said act. And the plaintiffs further offered in evidence, that shortly after the passage of the act of the general assembly aforesaid, of December session of the year 1825, chapter 190, there was sent to the governor, as claiming to be president of the board of trustees, and to each of the persons then claiming to be trustees under the said act, a notification or protest, from a committee of the Regents of the University of Maryland, authorized and directed by said regents to give such notification.

And the plaintiffs further read in evidence, the report of a joint committee of the house of delegates and senate of Maryland, at a session of the general assembly, of December session, 1825, and the documents accompanying the same.

And the plaintiffs further offered and read in evidence, the 5th of a series of resolutions, passed by the persons claiming

to be the Trustees of the University of Maryland, on the 15th day of June, 1826, as the same are entered on the minute book of said trustees, offered in evidence by the defendant. "Resolved, that it shall be the duty of the treasurer, having given bond in the penalty of fifty thousand dollars, with such security as may hereafter be approved of by this board, to receive all the moneys and funds of the University, and to deposite the same in the Bank of Baltimore, in the name of 'the Trustees of the University of Maryland,' to keep exact accounts of all receipts and payments, but no payments shall be made except by checks of the treasurer, countersigned by one of the executive committee, and he shall report statements of the finances of the institution when thereto required by the executive committee, and at all regular meetings of the trustees." And also proved by *Samuel H. Bowly*, a book-keeper in the Bank of Baltimore, that on the 1st December, 1837, there was a balance of cash in said bank, to the credit of the University of Maryland, of $2,360 11. That the ledger account of said University, which he kept as such book-keeper, is headed "The University of Maryland," and that the pass or bank book is headed, "Dr. The Bank of Baltimore in account with the Trustees of the University of Maryland," and that the first entry on the scratcher of money deposited under the said 5th resolution, which was on the 2d of August, 1826, is "Trustees of the University of Maryland." And the defendant proved by said *Bowly*, that he has no knowledge that the manner in which the ledger account is headed, as before stated, was known to the trustees of the University, or the treasurer.

And the plaintiffs further offered in evidence, from the minute books of the trustees of the University of Maryland, produced by the defendant, an account and report of the executive committee, dated May the 2d, 1836, from which it appeared, that there was a cash balance in the treasury on that day of $682 94.

The defendant thereupon offered in evidence, the act of assembly of December session, 1825, ch. 190, and the

minutes of the proceedings of the trustees of the University of Maryland, appointed under said act, which (with all other acts of assembly offered in evidence by either party) is agreed may be read and referred to in the Court of Appeals, as if incorporated with the record of this cause. He likewise proved that the said minutes of proceedings were until the 11th day of April, 1836, made and entered by *Louis Eichelberger*, the secretary of said board of trustees, and that the letters of acceptance from the professors named in the resolution of the 12th July, 1826, except those produced by defendant, were destroyed by fire in the year 1834, and that the said *Louis Eichelberger* is since dead.

He further offered in evidence, the letters of *Professor Pattison*, *Bishop Kemp*, and *Dr. Wyatt*, accepting professorships under the board of trustees.

The defendant then offered in evidence, the acts of assembly following, viz:

1798, ch. 105. 1826, ch. 261. 1827, ch. 68, 198. 1830, ch. 50. 1831, ch. 270. 1832, ch. 315. 1833, ch. 62.

And the acts following, viz: 1807, ch. 111. 1809, ch. 96. 1813, ch. 125. 1816, ch. 78. 1817, ch. 154. 1819, ch. 105, 163. 1820, ch. 121. 1825, ch. 188. 1826, ch. 261. 1827, ch. 198.

The defendant further offered in evidence, that at the time the act of 1825 was passed, the board of Regents of the University of Maryland consisted of the persons and composed of the faculties, following, viz:

Provost—Rev. James Kemp.

Faculty of Physic—Alexander McDowell, John B. Davidge, Nathaniel Potter, Elisha De Butts, Samuel Baker, Granville Sharp Pattison, Richard W. Hall.

Faculty of Divinity—Rev. Dr. Wm. E. Wyatt, Rev. Wm. Nevins, Rev. J. D. Kurtz, Rev. Geo. Roberts, Rev. Dr. Williams, Rev. John Glendy, Rev. J. P. K. Henshaw.

Faculty of Law—David Hoffman, George Winchester, William Frick, Nathaniel Williams, Jonathan Meredith, Roger B. Taney, U. S. Heath.

Faculty of Arts and Sciences—Rev. John Allen, Edward C. Pinkney, Charles W. Hanson, Wm. Howard, John P. Kennedy, John D. Craig.

And that of the said persons authorized to compose the said faculties, the following named, viz: the Rev. Dr. Kemp was appointed, accepted and acted till the period of his death, as the Provost of the University of Maryland, under said act of 1825, ch. 190. That all the persons composing said faculty of physic as aforesaid, were re-appointed by the board of trustees of the University of Maryland, accepted and acted in fact, under said act of 1825, ch. 190, and are the persons mentioned by those names in the minutes of proceedings of the trustees aforesaid. That of the persons composing the faculty of divinity, the Rev. Dr. Wyatt and Rev. Dr. Williams were re-appointed by said board of trustees, accepted and acted under the act of 1825, ch. 190—and that of said faculty, the Rev. Dr. Roberts and the Rev. J. P. K. Henshaw, were by said act of 1825, ch. 190, appointed trustees of said University of Maryland, and acted in said capacity. That of the persons composing the faculty of law as aforesaid, David Hoffman, Esq. was re-appointed by said board of trustees, accepted and acted as professor of law under said act of 1825, ch. 190. And that Nathaniel Williams, William Frick, and Roger B. Taney, in said faculty named, were by said act of 1825, ch. 190, appointed members of said board of trustees of the University of Maryland, and acted as such. That of said faculty of arts and sciences, Messrs. Allen, Pinkney, Kennedy, Hanson, and Dr. Howard, were re-appointed by said board of trustees, professors, under said act of 1825, ch. 190, and acted as professors in pursuance of such appointment.

The defendant then offered in evidence the following letters of nomination, to the trustees of the University of Maryland, to wit: a letter from Professor N. Potter, of 3d October, 1826, nominating Dr. Wright for the chair of Surgery; a letter from Professor Samuel Baker, of the 7th July, 1827, nominating Dr. J. B. Davidge for the same chair; one from Professor Davidge, nominating Dr. Wright; one from Pro-

fessor McDowell, nominating Dr. Dudley for the same post. And a letter from Professor Hall, of the 14th June, 1837, nominating several professors for chairs then vacant. And that after the organization of the board of trustees under said act of 1825, chap. 190, the professors and others, under the mandate of said trustees, annually signed and issued diplomas to graduates in said University. And that the board of Regents, the plaintiffs, at no time conferred degrees or discharged other duties incident to their office as Regents, from the period of the organization of the board of trustees under the act of 1825, chap. 190, until the 18th day of September, 1837.

The defendant further offered in evidence, a deed from John E. Howard to N. Potter and others, dated 15th May, 1815, conveying to the grantees a lot of ground in the western precincts of the city, reciting that the said grantees had borrowed for the use of the Regents of the University, the sum of $6,651, and conditioned that upon the payment of the same by the said Regents, the lot should be held for their use; and a deed from the executors of J. B. Davidge to the said trustees, for his interest in the University property, duly executed and recorded, dated 29th May, 1830. And the defendant also read to the jury a deed dated 14th of January, 1832, from Richard Hall and others, physicians, and on the 10th of July, 1823, professors of the faculty of medicine in the University of Maryland, to the trustees of the University of Maryland, conveying to the latter, for a valuable consideration, the lot of ground upon which the infirmary attached to the said University is erected. And a deed dated 14th January, 1834, from Nathaniel Potter and others, conveying to the said trustees, whom the deed recites to be the successors of the Regents under the act of 1825, ch. 190, the lot of ground conveyed as aforesaid by John E. Howard to them, by his deed of the 15th of May, 1815, together with the medical college and other buildings erected thereon. And the defendant also offered in evidence, a deed from the sheriff of Baltimore county, dated the 25th of May,

1832, conveying to the said trustees the interest of one of the professors of medicine in the University of Maryland, in the lot and infirmary, sold by the sheriff to satisfy a judgment against him.

The defendant then proved, that the full amount of the purchase money for the lot, upon which the infirmary is erected, has been paid by the said trustees, and that the judgments and premiums of insurance have, from time to time, as the same became due upon the property of the University, been paid by the said trustees. He further offered in evidence the accounts of the treasurer of the said board of trustees. The defendant further gave in evidence, the particular payments following, made at the several dates stated, and to the several professors receiving the same, and for the purposes stated opposite to each payment, comprising a period from 1826 to 1836; and proved, that under the provisions of the act of 1821, chap. 88, and since the organization of said board of trustees, under the act of 1825, chap. 190, the professors of the faculty of physic for the time being, gave and executed bond to the state of Maryland, according to the provisions of said act; and that since the resignation of said professors, herein before named, the bond given to the state has been executed by the professors of said faculty, newly appointed by said trustees.

The defendant then read in evidence, the letters of resignation of the professors of the medical faculty, and of the professor of law, dated in 1836 and 1837; and proved that from the period of the organization of said board of trustees under said act of 1825, chap. 190, said trustees received, and have always since had, peaceable and exclusive possession of the buildings, grounds, and all other property and funds of said University.

The defendant also offered in evidence, two petitions of the medical faculty of the University of Maryland to the legislature, the first dated January 4th, 1834, praying to be relieved from the payment of the interest on the sum of $30,000, loaned by the state to the University in the year 1821; the

other dated the 30th of January, 1837, reiterating the above prayer; and also praying, that such modification might be made in the charter, as would admit the medical faculty to a limited participation with the trustees, in the government of their particular faculty.

The plaintiffs by their counsel object to the admissibility in evidence of the act of the general assembly of Maryland, passed at December session, 1825, chap. 190, entitled, &c. as offered in evidence by the defendant, because, that by the acts of 1807 and 1812, given in evidence by the plaintiff in this cause, the plaintiffs were at the institution of their suit, and still are entitled to all the rights and privileges conferred by said acts upon "the Regents of the University of Maryland," which said two acts are still in full force and effect, notwithstanding the said act of 1825, chapter 190, the same being unconstitutional and void. First, according to the provisions of the bill of rights, and constitution of the state of Maryland; and, secondly, according to the provisions of the constitution of the United States. But the court *pro forma*, admitted the evidence aforesaid. The plaintiffs excepted.

2D EXCEPTION.—And the plaintiffs further offered to prove, by *Richard Wilmot Hall*, that witness, and Dr. Pattison, and Dr. Baker, and Dr. De Butts, and Dr. McDowell, while professors of the medical faculty of the University of Maryland, and David Hoffman, while professor of the faculty of law, borrowed at sundry times large sums of money, for the purposes of construction of the buildings and the enclosure wall of said buildings of the University of Maryland, and for the purpose of procuring apparatus for the medical, and surgical, and chemical departments of the University, which sums were applied to said purposes; that the first amount of the sums raised as aforesaid, was borrowed from the City Bank of Baltimore, in the year 1813 or 1814, and was $7,000; the next sum was borrowed from the Mechanics Bank of Baltimore, in the year 1813, 1814, or 1815, and was about $2,000; that the next sum was borrowed from the Bank of Baltimore, in amount $3,000, about 1820, and before 1825; $2,000

about the year 1821; $7,000 or $8,000 about the year 1823; and that this last sum was mainly applied to the building of the infirmary belonging to said University; and that there was borrowed as aforesaid, from the Union Bank of Maryland, $5,000, about the year 1823 or 1824, and before the year 1825, which sum was applied to the repairs of the centre building of the University, and to the lateral building; that in the year 1825, the said professors of medicine and law contracted with workmen for the repairs of the centre building aforesaid, for stopping leaks of the roof; and in the spring of 1826, the said professors of medicine paid for said repairs about $480; and that there remains yet unpaid to said professors of the amount of their said advances, the sum of upwards of $14,000, principal and interest. The plaintiffs further offered to prove by the said Hall, that in the year 1813, Jeremiah Sullivan made a donation to the corporation of the Regents of the University of Maryland, an Encyclopedia; and that after the year 1813, and before the year 1825, John Spear Smith made a donation to said corporation of a valuable collection of minerals; and that between the same periods Robert Gilmor made a donation to said corporation of a collection of minerals; and that various other donations were made before the year 1825, to said corporation. But the defendant objected to the admissibility of said Hall's testimony, because of said Hall being one of the persons now, and at the institution of this suit claiming to be one of the Regents of the University of Maryland, and as such, one of the plaintiffs in this suit, and which facts were admitted by plaintiff's counsel at the time of offering said witness; which objection the court, *pro forma*, sustained, and rejected the said evidence. Whereupon the plaintiffs by their counsel excepted.

3d Exception.—And the plaintiff further offered to prove, by Maxwell McDowell, that the professors of the medical faculty, and of the law faculty of the University of Maryland, before the year 1825, borrowed money to a large amount at different times, upon their personal responsibility, for the purposes of the University, and to enable it to prosecute the ob-

jects of the University, as prescribed by the act aforesaid, incorporating the said University; and also, that there were made to the Regents of the University of Maryland, before the year 1825, various valuable donations for the benefit of said University, and in aid of its objects. But the defendant objected to the admission of said testimony, inasmuch, (as was admitted by the plaintiffs,) the said McDowell was a Regent of the University of Maryland at the time of the passage of the act of 1825, chap. 190, and at no time had resigned or been removed by the Regents, his situation as Regent. Whereupon the court, *pro forma*, rejected the evidence so as above in this exception offered. Whereupon the plaintiffs, by their counsel, excepted.

4TH EXCEPTION.—The plaintiffs then prayed the court to direct the jury, that notwithstanding the act of 1825, chap. 190, given in evidence, the plaintiffs are entitled to recover, if the jury shall believe the evidence given in the cause, and shall find that at any time within three years before the instituting of this suit, the defendant received moneys exceeding the amount of one hundred dollars, and not appropriated by him for any of the purposes of the University of Maryland, or in execution of any of the orders or resolutions of the persons or body, claiming under the act aforesaid, to be the trustees of the University of Maryland, and which shall have been claimed and received by the defendant, as treasurer of the said trustees.

2. That notwithstanding the act of 1825, chap. 190, the plaintiffs are entitled to recover, if the jury shall believe the evidence given in the cause, and shall find that at any time heretofore, the defendant received money exceeding the amount of $100, and not appropriated by him for any of the purposes of the University of Maryland, or in execution of any orders or resolutions of the persons or body claiming under the act aforesaid, to be the trustees of the University of Maryland, and which shall have been claimed and received by the defendant, as treasurer of the said trustees.

3. That, upon the evidence offered in this cause, if the jury

find the same to be true, they are entitled to recover, because the act of the general assembly of Maryland, passed at the December session, in the year 1825, chap. 190, entitled, "An act supplementary to the act entitled an act for founding an University in the city or precincts of Baltimore, by the name of the University of Maryland," is unconstitutional, and therefore void.

Which said several prayers of the plaintiffs, and each of them, the court, *pro forma*, rejected, and refused to direct the jury as prayed. Whereupon the plaintiffs excepted.

The verdict and judgment being for the defendant, the Regents appealed to this court.

At the argument of the cause in this court, before BUCHANAN, Chief Judge, and STEPHEN and SPENCE, Judges.

Under the agreement mentioned in the record, the proceedings of the board of Regents of the 17th of March, 1836, were read, appointing a committee to take the opinion of counsel in relation to the constitutionality of the act of 1825, ch. 190, with a resolution that, in case the said law should be considered unconstitutional by counsel, that an address should be presented to the governor, and to the trustees appointed to the government of the University by said law, asking them to defer acting thereunder, until the subject could be again brought before the legislature; and in case of their refusal, to adopt legal measures, to resist the execution of the law.

The counsel consulted by the committee, having given an opinion against the constitutionality of the law, they, in conformity with the resolution of the Regents, addressed a communication to the governor and trustees, on the 22d of May, 1836, (enclosing the opinion) asking them to suspend the execution of the law until the then next meeting of the legislature, when an application would be made for its repeal; and proposing, in case of refusal, that steps should be taken for a speedy judicial decision upon its constitutionality by the proper tribunal.

These documents were also read.

EVANS, MAYER, MARTIN, and MEREDITH, for the appellants, contended:

1. That the corporation of the Regents of the University, is a private corporation. They cited on this point *Act* 1817, *ch.* 154, 210. 1807, *ch.* 153. 1812, *ch.* 159. *Lightly vs. Clouston*, 1 *Taunt.* 112. *Dartmouth College vs. Woodward*, 4 *Wheat.* 518, 636, 671. *Ib.* 4 *Cond. Pet. S. C.* 539, 540, 557, 558. *Allen vs. McKeen*, 1 *Sumner*, 277, 296, 298, 299. 3 *Stor. Con. U. S.* 260. *Ang. and Ames*, 8, 21. *Act* 1812, *ch.* 159, *sec.* 9–19. 1803, *ch.* 92, *sec.* 1. 2 *Kent Com.* 300, 304, 305. *The People vs. Morris*, 13 *Wendell*, 337. *Rex vs. Cambridge, V. C.* 3 *Burr.* 1656. *Attorney General vs. Pearce*, 2 *Atk.* 87. *Stanley vs. Robinson*, 4 *Pet. C. C. R.* 544. *Case of St. Mary's Church*, 7 *Serg. and Raw.* 517. *Society, &c. vs. New Haven*, 8 *Wheat.* 464. 2 *Kent*, 275. 3 *B. Stat.* 213, *Hen.* 8. *Ib.* 794, *Hen.* 8. *Gilb. Law Evid.* 12, 13.

2. That the charter of such a corporation is a contract between the state and the corporators; and also, between the state, the corporators, and those persons who contributed to the endowment. *Dartmouth College vs. Woodward*, 4 *Pet. Con. S. C. R.* 553-4, 556, 579 *a* 583. *Ashby vs. White*, 2 *L. Ray.* 938. 14 *Law Lib.* 132. *The King vs. John Patterson*, 24 *Serg. and Low*, 1, 14. *Dartmouth College vs. Woodward*, 4 *Wheat.* 695, 629, 693, 689. *Jenk. Cent.* 270. *Plac.* 28. *Allen vs. McKeen*, 1 *Sum.* 300, 301. *Journal H. of D.* 1825, *p.* 152. *Mumma vs. the Potomac Co.* 8 *Peter*, 282. *Case of St. Mary's Church*, 7 *Serg. and Raw.* 530, 558, 559, 565. 1 *Trum. His. of Con.* 407. *Ang. and Ames*, 507, 510. *Slee vs. Bloom*, 19 *John.* 456. *Riddle vs. the County of Bedford*, 7 *Serg. and Raw.* 392.

3. That the act of 1825, ch. 190, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States. *Journal H. of D.* 1825, 152. 3 *Dall.* 388, 390. *Bill of Rights*, 21 *sec.* — *art.* 10 *sec. Con. U. S. Terrett, et al vs. Taylor, et al*, 9 *Cranch*, 43. *Fletcher vs. Peck*, 6 *Cranch*, 88. *State of New Jersey vs. Wilson*, 7

Cranch, 164. *The town of Pawlet vs. Clark*, 9 *Cranch*, 292. *Dartmouth College vs. Woodward*, 4 *Wheat.* 518. *Allen vs. McKeen*, 1 *Sumner*, 276. *Norris vs. Trustees of Abingdon Academy*, 7 *G. and J.* 7. *Adams vs. Storey*, 1 *Payne*, *C. C. R.* 107. 11 *Peters S. C. R.* 420. *Canal Company vs. Rail Road Company*, 4 *G. and J.* 108.

4. That the act of 1825, is unconstitutional and void. *Norris vs. Abingdon Academy*, 7 *G. and J.* 7. *The Canal Bridge Co. vs. Gordon*, 1 *Pick*, 304. 2 *Kent*, 312. *Trustees of Vernon vs. Hills*, 6 *Cow.* 23. 1 *Hals.* 191. *Sutton vs. Johnstone*, 2 *Term Rep.* 513. *Canal Co. vs. Rail Road Co.* 4 *G. and J.* 107. *Allen vs. McKeen*, 1 *Sumner*, 276, 313. *Ehrenzeller vs. Union Land Co.* 1 *Rawl.* 181, 183. *Wellington, et al vs. Petitioners, &c.* 16 *Pick*, 96, 98, 99. 3 *Sto. Com.* 262. *Ang. and Ames on Corp.* 504, 505. *Dartmouth College vs. Woodward*, 4 *Wheat.* 688. *Case of St. Mary's Church*, 7 *Serg. and Raw.* 559.

5. That the individual members of the corporation of The Regents of the University of Maryland, have no individual interest in the corporate property of that institution, and are not individually liable for its corporate debts, and that Drs. Howard and McDowell are consequently competent witnesses in this cause. *The City Bank vs. Bateman*, 7 *Harr. and John.* 105. *Nor. Peake*, 219. 1 *Stark*, 126. *Weller vs. the Governor of the Foundling Hospital*, *Peake's Cases*, 153.

6. That assuming the act of 1825 to be unconstitutional, the appellant is entitled to recover in this action. *Acts of* 1798, *ch.* 105. 1807, *ch.* 153. 1812, *ch.* 159. 1816, *ch.* 78. *Wellington, et al vs. Petitioners*, 16 *Pick*, 96. *Dillingham, et al vs. Snow*, 5 *Mass.* 554. *Angel and Ames*, 514. *Hall vs. Marston*, 17 *Mass.* 575. *Chapman vs. Williams*, 7 *Harr. and J.* 157. Upon the forms of the prayers. *Graham and Parran vs. Harris, Parran & Co.* 5 *G. and J.* 493.

Nelson and R. Johnson, for the appellees, contended:

1. That the act of 1812, ch. 159, incorporating the Regents of the University of Maryland, cannot be regarded

as a contract, the corporation thereby created, being a public corporation. *Mumma vs. the Potomac Co.* 8 *Peters*, 281.

2. That the act of 1825, ch. 148, is not repugnant to the constitution of Maryland or of the United States. *McCulloh vs. the State of Maryland*, 4 *Wheat.* 424, 428, 429. *Mumma vs. Potomac Co.* 8 *Pet.* 281. *Wellington, et al vs. Petitioners*, 16 *Pick*, 98. 1 *Kidd*, 67, 68. *The King vs. Larwood*, 1 *Lord Ray.* 29, 32. *Allen vs. McKeen*, 1 *Sum.* 303. *Rex vs. Hughes*, 5 *B. and Cres.* 886.

3. That assuming said law to be unconstitutional, still the plaintiffs below were not entitled to recover in this suit, because of the acts of said Regent subsequent to the passage of said law. *Kent Com.* 308, 309. *The King vs. John Pasmore*, 3 *Term*, 199. *The King vs. Morris*, 4 *East*, 17. *The King vs. Morris and Stewart*, 3 *East*, 213. *The King vs. Miller*, 6 *T. R.* 279. *Smith vs. Smith*, 3 *Des.* 557, 576, 577, 578, 580. *King vs. Hughes*, 12 *Serg. and Low*, 399. 14 *Law Lib.* 133, 135. *Bank U. S. vs. Dandridge*, 12 *Wheat.* 70. *Union Bank vs. Ridgely*, 1 *H. and G.* 426. *The Canal Bridge vs. Gordon*, 1 *Pick*, 297. *Canal Co. vs. Rail Road Co.* 4 *G. and J.* 106, 107, 150, 151. *The King vs. Sir G. Chetwynd*, 14 *Serg. and Low*, 111. *The King vs. Wardroper*, 4 *Burr.* 2024. *Hampshire Co. vs. Franklin Co.* 16 *Mass.* 86. *Riddle vs. Proprietors of Locks*, 7 *Mass.* 184. *Canal Bridge vs. Gordon*, 1 *Pick*, 297, 304, 308. *Wellington, et al vs. Petitioners*, 16 *Pick*, 97.

4. That there is no evidence in the record to show any assumpsit by the defendant to the plaintiffs, and that they therefore were not entitled to recover in this suit. *White vs. Bartlett*, 23 *Serg. and Low.* 312. *Nickolson vs. Knowles*, 5 *Mad.* 47. *Blackburn vs. Scholes*, 2 *Camp.* 344. *Dixon vs. Hammond*, 2 *Barn. and Ald.* 310. *Roberts vs. Ogilby*, 9 *Price*, 269. *Gasling vs. Birnie*, 7 *Bing.* 339. *Travis vs. Claiborne*, 5 *Munf.* 435.

5. That the testimony proposed to be given in the trial below by Doctors Hall and McDowell, was properly rejected by the court.

6. Upon the questions of form and practice. *Agnew vs. the Bank of Gettysburg*, 2 *H. and G.* 478, 493. *Graham and Parran vs. Harris, et al*, 5 *G. and J.* 490. *Bosley vs. Chesapeake Ins. Co.* 3 *G. and J.* 450, 462. *Cole vs. Hebb*, 7 *G. and J.* 20, 26. *Duvall vs. Farmers Bank of Md. ib.* 60. *Davis vs. Leab*, 2 *G. and J.* 302. *Newson, adm. vs. Douglass*, 7 *Harr. and J.* 452. *Hicks vs. Hicks and Norris*, 5 *G. and J.* 82. *McCreary vs. McCreary, ib.* 152. *Maryland Ins. Co. vs. Bathurst*, 224. *McElderry, et al vs. Flannigan*, 1 *H. and G.* 308.

7. That if the act of 1824, ch. 148, is unconstitutional, the act of 1812, ch. 159, is likewise unconstitutional, it being repugnant to the acts of 1798, ch. 205, and 1807, ch. 153.

Buchanan, Ch. J. delivered the opinion of the court.

A variety of questions arise in this case, which is one of a grave and delicate character. Important as respects the interests involved, and the results to the community. What may be the effect of the decision of this court (whether beneficial or otherwise) upon the usefulness and future operations of the University, we do not know, nor is it our business to inquire; looking only, and with a single eye, as it is our duty to do, to the questions alone submitted to us, and seeking to decide them, according to the principles of law governing such questions, whatever the consequences may be. Grave and delicate, as it draws in question the validity of an act of the legislature of the state, we are not insensible to the caution with which such questions should always be approached, nor the deliberation with which they should be examined; accompanied by a becoming deference to the legislature, and its high and important functions, and a just regard to the duties and character of the judicial office.

It has been said, that a legislative act should not be pronounced unconstitutional or invalid, in a doubtful case: nor should it, where the doubt is *bona fide*, and well founded, and not the result of a disinclination to deny the authority of the legislature, which all must feel, but none should yield to

in violation of a solemn duty. But where a judge is satisfied upon full consideration, that an act of the legislature is contrary to the constitution of the United States, the supreme law which he is bound to obey, and which must prevail over any act that comes in conflict, and cannot stand with it, or is for any other reason invalid, he has no choice; and all that is left him, is honestly and fearlessly to do his duty;—from the faithful discharge of which, however unpleasant the task, no upright judge can shrink if he would. On the other hand, a judge should not suffer himself to be betrayed to pronounce an act unconstitutional or invalid on insufficient grounds, by a morbid apprehension that a contrary decision might be ascribed to the want of a just and proper sense of judicial duty. Thus impressed, we proceed to the examination of this case—and the first question presented by the record, and which meets us at the threshold, arises on the first bill of exceptions, upon an objection by the counsel of the appellants to the admissibility in evidence of the act of the legislature of this state, passed at the December session, 1825, ch. 190, (which was offered in evidence on the part of the defendant, and admitted by the court below) on the alleged grounds of its being contrary to the constitution of the United States, and to the Bill of Rights and constitution of this state, and is also raised on the first prayer in the fourth exception. The consideration of which, involves other questions upon which the validity of that act depends.

By the act of 1798, ch. 105, a number of persons were incorporated under the name and title of "The Medical and Chirurgical Faculty of the State of Maryland," with authority to elect twelve persons to be styled "The Medical Board of Examiners for the State of Maryland," whose duty it is declared to be, to grant licenses to gentlemen qualified to practise medicine and surgery, upon the payment to the treasurer of the faculty by each person so obtaining a certificate or license, of a sum not exceeding ten dollars, to be fixed on or ascertained by the faculty. And the sixth section subjects persons who shall practise in either of those branches, and

receive payment for his services, without having first obtained such license, to a penalty of fifty dollars for each offence, to be recovered in the county court where he may reside, by bill of presentment and indictment, one-half for the use of the faculty, and the other for that of the informer.

The second section of the act of 1807, ch. 53, provides for the establishment in the city or precincts of Baltimore, of a college for the promotion of medical knowledge, by the name of "The College of Medicine of Maryland," to be founded and maintained forever. And the third section declares, that the members of the board of medical examiners for this state, for the time being, together with the president and professors of the college of medicine, shall be one community, corporation, and body politic, by the name of "The Regents of the College of Medicine of Maryland." Thus constituting those two separate and distinct bodies, as might well be done, one corporation; and making them the regents or governors of "The College of Medicine of Maryland," for the management and conduct of which they were thus incorporated.

The fourth section gives to the regents the power to acquire, dispose of, and employ real and personal estate for the purposes of the college.

The ninth section authorizes and empowers the regents from time to time to constitute and appoint (without restriction as to number) professors of the different branches of medicine, to be "severally styled professors of such branch as they shall be nominated and appointed for, according to each particular nomination and appointment," and also to appoint lecturers in like manner. "The professors and lecturers so constituted and appointed from time to time," to be known and distinguished by the name of "The Medical Faculty of the College of Medicine of Maryland."

The twelfth section authorizes the granting diplomas, and admitting students of the college and others, to the office and profession of surgeon, and to the degrees of bachelor and doctor of medicine.

The sixteenth section appoints six persons by name to be professors, until further arrangements made by the regents of the college.

The eighteenth section constitutes "The Medical and Chirurgical Faculty of the State of Maryland," the patrons and visitors of the college; and other sections give to the regents the power to appoint a president, to have and to use one common seal, and one privy sale, and the capacity to sue and be sued, &c.

The first section of the act for founding "an University in the city or precincts of Baltimore," passed at the December session, 1812, ch. 159, provides that the college for the promotion of medical knowledge, by the name of "The College of Medicine of Maryland," be and the same is hereby authorized to constitute, appoint and annex to itself, the three other colleges or faculties, viz: The faculty of Divinity, the faculty of Law, and the faculty of the Arts and Sciences, and declares "that the four faculties or colleges thus united, shall be and they are hereby constituted an university, by the name and under the title of The University of Maryland."

By the third section it is enacted, "that the members of the said four faculties, with the Provost of the said University and their successors, shall be and are hereby declared to be one corporation and body politic, to have continuance forever, by the name and style of "The Regents of the University of Maryland," with capacity to acquire, enjoy and dispose of real and personal estate for the purposes and interests of the University.

The seventh section gives authority to the regents to appoint a Provost of the University.

The eighth section provides that "each faculty shall possess the power of appointing its own professors and lecturers."

The tenth section provides "that the professors now appointed and authorized in the College of Medicine of Maryland and their successors, shall constitute the faculty of physic; that the professor of theology, together with six ordained ministers of any religious society or denomination and their successors, shall form and constitute the faculty of divinity;

that the professor of law, together with six qualified members of the bar, and their successors, shall form and constitute the faculty of law; and that the professors of the arts and sciences, together with three of the principals of any three academies or colleges of this state, and their successors, shall form and constitute the faculty of the arts and sciences.

By the ninth section each faculty is authorized to exercise such powers as shall be "delegated" to it by the Regents of the University, for the instruction, discipline, and government of the institution, and of all students, officers, and servants, belonging to it—and the eleventh section provides that the regents shall meet at least once a year, in stated meetings, to be appointed by their own ordinances, "in order to examine into all matters touching the discipline of the institution, and the good and wholesome execution of their laws," with authority when assembled, "to make their own rules of proceeding, and to make fundamental regulations for the government and discipline of the University," and declares that at all such meetings "a majority of the whole number of regents shall be a quorum to do any business, except to vacate the seat of the provost of said University, or of the professors or lecturers; for which purpose the *consent* of three-fourths of the whole number of the regents shall be necessary, and then only on a formal impeachment," with other sections (as in the act of 1807, ch. 53, for founding a Medical College in the city or precincts of Baltimore) giving to the Regents the capacity to sue and be sued; the authority to make and use one common and public, and one privy seal, and to grant diplomas, and certificates of admission to the office and profession of surgeon, and to the degrees of bachelor and doctor of physic, &c. And the last section professes to repeal so much of the act of 1807, ch. 53, for founding a Medical College in the city or precincts of Baltimore, "as is inconsistent with, repugnant to, or supplied by" this latter act.

It has been asserted in argument, that the corporations created by these three acts are *public* and not *private* corporations; and hinted, rather than seriously insisted upon, that if they are to be considered and treated as *private* corpora-

tions, and the acts creating them as grants or contracts within the meaning and grasp of the 10th section of the 1st article of the Constitution of the United States, which declares that "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," the act of 1812, chap. 159, violates the provisions of the two preceding acts of incorporation, and is itself unconstitutional and void.

These propositions will be examined.

A corporation may be *private*, and yet the act or charter of incorporation contain provisions of a purely public character, introduced solely for the public good, and as a general police regulation of the state; such as the *Stat. 14th, 15th Henry the 8th, ch. 5*, creating the College of Physicians in London, and imposing a fine on persons practising without license from the college, which was held to be a *private* corporation, *Gilbert's Evid.* 13, and the statute of the same reign, chap. 42, founding The College of Barbers and Surgeons.

The provisions of the act of 1798, ch. 105, making it the duty of the "Board of Medical Examiners" to grant licenses to such as should apply, and who, on examination, should be found qualified to practise physic or surgery, on their paying to the treasurer ten dollars, and imposing a fine of fifty dollars on such as should practise without having first obtained such license, one-half for the use of the faculty and the other for the use of the informer, are supposed to be practically infringed by the act of 1812, ch. 159, founding the University of Maryland; by which authority is given to the Regents to grant diplomas and certificates of admission to the office and profession of surgeon, and to the degrees of bachelor and doctor of physic, &c. Thus virtually, as it is said, removing the necessity for obtaining a license from the board of medical examiners, and in effect invading the rights of the Medical and Chirurgical Faculty, and impairing its interest in the fees for licenses, and the penalty imposed for practising without license from the board of medical examiners. The same may be said of the act of 1807, ch. 53, by which the same authority is given to the Regents of the college of medicine to grant diplomas and certificates of admission to the office and pro-

fession of surgeon, and the degrees of bachelor and doctor of physic, that is given by the act of 1812, ch. 159, to the Regents of the University. Of this supposed violation of the rights of the Medical and Chirurgical Faculty, that institution is not here complaining, and to which no exception has ever been taken until now, for the first time, by this defendant, having no connexion with that faculty, and professing to act as an officer or agent of a board claiming to be trustees of the University, to the charter of which, this alleged infraction of the corporate rights of the Medical and Chirurgical Faculty is ascribed.

The charter of the University has no express provision dispensing with the necessity of a license to practise from the board of medical examiners, nor authorizing graduates of that institution to practise without such license.

But admitting that to be the effect of the authority to grant diplomas, and that a student of the University having obtained a diploma, would not be under the necessity to procure any other license, and would be entitled to practise without subjecting himself to the penalty provided by the act of 1798, ch. 105, and therefore would not be likely to incur the unnecessary trouble and cost of procuring any further license; and that such practical result is equivalent to a direct repeal of so much of the act of 1798, ch. 105, as provides for the payment of ten dollars for a license to practise from the board of examiners, and imposes a fine for practising without such license; and admitting also, that if such repeal would be a violation of the vested and chartered rights of the corporation, created by the act of 1798, and therefore void, and the defendant under the pleadings in this cause, has a right to avail himself of that defence, the most that can be said is, that the act of 1812, ch. 159, is unconstitutional and void, so far only as it authorizes the Regents of the University to grant diplomas, &c. and no further.

But are the rights here set up, as belonging to the Medical and Chirurgical Faculty, such inviolable vested rights as are placed beyond the reach of legislative power?

The legislature possesses the power to regulate the internal police of the state; a political power imparted to that department of the government of which it is difficult to say it can entirely disrobe itself. It has among others, the power to pass penal and sanatory laws, and to revoke them at pleasure, as circumstances and experience may require and teach; and, having regard to the health and lives of the citizens of the state, to adopt from time to time such wholesome regulations as may be deemed best calculated to guard against the evils and mischiefs attendant upon the practice of physic and surgery by ignorant and incompetent persons.

That the legislature might at any time, without the intervention of a corporation, have provided for the organization of a board or boards, for the examination of persons applying for admission to the practise of physic or surgery, and imposed a penalty upon any who should practise without having first obtained a license from such board, and afterwards from time to time have adopted other means more or less efficient, for the promotion of the desired end; or, whether wisely or not, have removed the restriction altogether, is a proposition not to be questioned.

Impressed as it would seem, with the sense of the evil consequences flowing from the pernicious practices of pretenders to the art, the legislature in 1798, as a general police regulation, embodied, as it had a right to do, in the act incorporating the Medical and Chirurgical Faculty, with authority to appoint a board of examiners, not being of themselves a corporation, the provisions for examination and license by the board of examiners, on the payment of ten dollars by the party applying, and the prohibition to practise without such license, under the penalty prescribed.

The object is manifest. It was to encourage and promote the acquisition of knowledge in the profession, and thereby to shield the community from the pernicious effects of the ignorance of unskilful pretenders. And the board of examiners was resorted to as the means of effecting that end, and for that purpose may be considered as the agents or officers of the state.

It is difficult to suppose that the legislature, in adopting that regulation of internal police, intended to part with the whole political power of the state over the subject, and to transfer and repose it entirely in the corporation of the Medical and Chirurgical Faculty. The corporation acquired no vested inviolable right to that political power. The provisions under consideration were introduced, not for the regulation or promotion of private purposes or interests, but for a public purpose, the attainment alone of a public end—the prevention of mischief by the ignorant and unskilful, by the punishment of those who should be found offending against the law.

The examining and granting of licenses by the board of examiners to applicants proved to be qualified to practise, was not a franchise nor property, but in terms a duty imposed, and the allowance to the faculty of the fees for licenses, and a portion of the penalty imposed for practising without license, was merely an incident of a public regulation.

To say that the act of 1812 is unconstitutional, because, by construction, a diploma granted to a graduate of the University may entitle him to practise without being subject to a fine for not having first obtained a license from the board of examiners, would be to deny to the legislature the power to pass any law rendering a license by the board of examiners unnecessary, however expedient the further exercise of that political power may be, which we are not prepared to do.

It has been said too, that the 10th section of the act of 1812 is at war with and violates the 8th section of the act of 1798, but that will be seen, on a slight examination, to be an entire mistake. The 8th section of the act of 1798 provides that every person who shall be elected a member of the medical faculty, shall pay a sum not exceeding ten dollars, power being before given to the Medical and Chirurgical Faculty to elect other members by the "medical faculty" there spoken of, is clearly intended the "Medical and Chirurgical Faculty" created by that act. There was no other medical faculty then in being, and none other could have been meant.

The act of 1807, ch. 53, provides for a faculty consisting

of professors and lecturers, to be called the Medical Faculty of the College of Medicine; a separate and distinct institution from the Medical and Chirurgical Faculty. The act of 1812, ch. 159, authorizes the college of medicine, to constitute and annex to itself three other faculties; and declares that the four faculties united, that is, the three to be created and the medical faculty (then existing) of that college, shall be a University. And the tenth section directing how the four faculties of the University shall be constituted, provides that the professors now appointed and authorized in the college of medicine, shall constitute the faculty of physic; not the members of the Medical and Chirurgical Faculty, for there were no professors in that institution; and by the "faculty of physic," evidently meaning the medical faculty, one of the four faculties constituting the University; and not the "Medical and Chirurgical Faculty," to which it has no relation, and does not, in any manner whatsoever, interfere with the mode of appointing its members.

Again, it is suggested that the act of 1812, in some of its provisions, virtually repeals parts of the constitution of the College of Medicine of Maryland, and professes by the last section, to repeal all such parts of the act of 1807, as are inconsistent with or repugnant to the latter act, and is therefore void; assuming the corporation of the Regents of the College of Medicine of Maryland, created by the act of 1807, to be a private corporation.

And whether the corporation of the Regents of the College of Medicine is a distinct and independent corporation, separately existing as such in its original character, for the promotion of medical knowledge alone, or has been enlarged and expanded to the higher degree and rank of an University by the act of 1812, is the question that will be next examined.

By the act of 1807 it was provided, that there should be a college for the promotion of medical knowledge, by the name of "The College of Medicine of Maryland," established in the city or precincts of Baltimore, to be founded and maintained forever, with a president and professors, and a faculty

consisting of professors and lecturers, to be known by the name of "The Medical Faculty of the College of Medicine of Maryland," to be appointed from time to time by the regents; and for the management or government of the institution, the president and professors, together with "the members of the Board of Medical Examiners," were incorporated by the name of "The Regents of the College of Medicine of Maryland."

Afterwards, the college being organized, the legislature by the act of 1812, ch. 159, on the petition of the president and professors of the College of Medicine of Maryland, as such, authorized "the college for the promotion of medical knowledge, by the name of the College of Medicine of Maryland," to constitute, appoint and annex to itself "three other colleges or faculties," "The Faculty of Divinity," "The Faculty of Law," and the Faculty of the Arts and Sciences; constituting the four faculties when thus united, an University by the name of "The University of Maryland," empowering the Regents of the University to appoint a provost, and declaring the members of the four *faculties* together with the provost, to be one corporation and body politic, by the name of "The Regents of the University of Maryland," omitting throughout "The Board of Medical Examiners."

It is sufficient to say of a corporation aggregate, of which various definitions are to be found in the books, some fanciful and metaphysical, that it is an artificial intellectual being, the mere creature of the law, composed generally of natural persons in their natural capacity; but may also be composed of persons in their political capacity of members of other corporations, as in the case of *Christ's Hospital of Bridewell*, chartered by Edward the Sixth, of which the mayor, citizens, and commonalty of London, are made the governors, and incorporated by the name of the governors, &c. of the hospital of Edward the sixth of England, of Christ Bridewell—so in the cases of the Universities of Oxford and Cambridge, of which the many colleges (distinct and separate corporations) within those Universities, form component parts of those larger cor-

porations. And the individuals, or any of them who, in their natural capacity compose one corporation, may in the same capacity, compose another distinct and separate corporation; as the president and directors of one bank, or any number of them, may be the president and directors of another bank, or the incorporated managers of any other institution. These undeniable propositions kept in view, will assist in the examination of the question under consideration.

The president and professors of the college or faculty for the promotion of medical knowledge, called The College of Medicine of Maryland, constitute that college or faculty; and the Regents of the College of Medicine, differently constituted, are made the governors and managers of the institution. The act of 1812 authorizes, not the Regents, but the College for the promotion of medical knowledge, consisting of the president and professors, to constitute, appoint and annex to itself, the three other colleges or faculties; thus by the use of the words other colleges or faculties, treating and considering the college as itself a faculty, composed of natural persons, having the capacity to act, and through whose agency alone, as natural persons, it could constitute and appoint the other colleges or faculties. If it had been the intention to give the authority to the corporation as such, it would have been given to "The Regents of the College of Medicine," and not to the college or faculty; which, with their assent could as well have been done. But no such assent appears, and the fact, that in the petition of the president and professors of the college upon which the act of 1812 was passed, they ask that "they and others and their successors may be incorporated as Regents of an University, to be called the University of Maryland," shows that the legislature acting upon that petition, meant by the college for the promotion of medical knowledge, by the name of the College of Medicine of Maryland, the faculty or the president and professors constituting the faculty, as distinguished from the corporation of Regents.

The corporation of the Regents of the college, independent

of the constitution of the United States, or the Bill of Rights and constitution of this state, is not destroyed, or merged in the corporation of the Regents of the University; which was originally to be composed of the provost, with the members of the four faculties, omitting the members of the board of examiners, (a component part of the Regents of the college) neither of them being of itself a corporation. That is, the members of the faculty (then existing) of the college, and of the three other faculties to be created; with power given to each, to appoint its own professors and lecturers. The corporation of "The Regents of the College of Medicine," and the corporation of "The Regents of the University," are presented by the acts of 1807 and 1812, as two ideal artificial beings, existing only in contemplation of law, both composed of natural persons and acting through and by the natural agents or persons composing them, respectively. And the professors of the college of medicine originally made members of the corporation of "The Regents of the University," in their natural capacity, and not in a political capacity of members of another corporation; but not therefore ceasing to be members of the corporation of the regents of the college, which is not more incompatible with the separate corporate existence of the two institutions, than if they had been made the president and directors of an incorporated bank, or been incorporated alone, or with others, as the governors or managers of any other institution, nor more than the individuals composing any corporation, and at the same time becoming members of another corporation, would be, with the continued existence of both corporations. The corporations of London, and of Christ's Hospital of Bridewell, are separately existing corporations, although the mayor, citizens, and commonalty of London, are incorporated by the name of the governors, &c. of the hospital, &c. of Christ Bridewell, so the many colleges within the Universities of Oxford and Cambridge, are separate and distinct corporations from each other, and from the larger corporations of those respective institutions.

On the 6th of January, 1813, the faculty of physic of the college of medicine of Maryland, appointed and annexed to itself the three other faculties of divinity, law, and the arts and sciences, in pursuance of the act of 1812, and on the 22d of April, 1813, at a meeting of the Regents of "The University of Maryland," a provost and secretary were elected.

Although on the original organization of the University, the professors at that time *appointed and authorized in the college of medicine*, constituted the faculty of physic of the University under the 10th section of the act of 1812; yet it did not follow that they were always to compose that faculty. On the contrary, the words of that section, *the professors now appointed and authorized*, &c. would seem to imply that they might not, but that as the vacancies occurring from time to time should be filled up, it might become constituted in whole or in part of other persons, there being no restriction in the selection to the professors of the college, and very properly. For if it were otherwise, the faculty itself might become extinct by the dissolution or forfeiture of the corporation of the college.

Besides, if the professors of the college of medicine and their successors, were necessarily at all times to compose the faculty of physic in the University, as the Regents of the college have alone the power to appoint their own professors, the faculty might thus become constituted of incompetent persons, by the injudicious appointment of professors by the Regents of the college, (should that at any time happen) to the great prejudice of the character and usefulness of the University, without the means of guarding against such a result.

The college of medicine then, and the University, exist in contemplation of law, as distinct and independent corporations, in possession of all the rights and franchises conferred upon them by the acts of their incorporation, each having the power to keep and use a public and privy seal; to sue and be sued; to acquire and dispose of property, real and personal; to pass by-laws; to grant diplomas; and to perpetuate itself.

And there being nothing in the act of 1807 inconsistent

with or repugnant to the act of 1812, the last section of the act of 1812 is wholly inoperative, without reference to the question whether the corporation created by the act of 1807 is a private corporation or not; nor could proceedings in nature of a *quo warranto* be sustained against the Regents of the University, acting under the authority of the act of 1812, for usurpation of corporate franchises, in violation of the rights and franchises of the Regents of the college of medicine. The enjoyment and exercise by each, of all the rights and privileges granted them respectively, being entirely compatible, and the powers and authority of one not inconsistent with or opposed to the powers and authority of the other. The legislature having the same undoubted right to establish as many independent colleges and universities in *Baltimore* (not impairing the rights of others) as may be deemed expedient and proper, that it has to incorporate an additional number of banks.

The next subject of inquiry is, whether the corporation of "The Regents of the University" is a public or a private corporation; if at this day, that can be considered an open question.

A public corporation, is one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the legislature, and its members officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns, &c.; so where a bank is created by the government for its own uses, and the stock belongs exclusively to the government, it is a public corporation; and so of a hospital created and endowed by the government for general purposes of charity.

The corporation of the University has none of the characteristics of a public corporation. It is not a municipal corporation. It was not created for political purposes, and is invested with no political powers. It is not an instrument of the government created for its own uses, nor are its members officers of the government, or subject to its control in the due

management of its affairs, and none of its property or funds belong to the government. The state was not the *founder*, in the sense of that term as applied to corporations. It was the creator only, by means of the act of incorporation, and may be called the *incipient*, not the *perficient* founder. It gave to it in its creation the capacity to acquire and to hold property, but made to it no donation; and whatever property the corporation has, is its own, to be managed and disposed of by the Regents for the uses of the institution, in such manner as they may judge most promotive of its interests, and not for the uses of the government, nor in the exercise of any political powers, but as the trustees merely for the University. It is said there have been subsequent endowments by the state. If it be so, that cannot affect the character of this corporation. If eleemosynary and private at first, no subsequent endowment of it by the state, could change its character, and make it public. But it nowhere appears that any such endowments have been made. Several acts of assembly were passed, authorizing money to be raised by lottery for the use of the University; and by the act of 1821, ch. 88, certificates of five per cent. stock of the state were authorized to be issued by the treasurer, to the amount of $30,000, to be appropriated to the payment of the debts of the institution; the medical professors of the University being required to enter into bond for the annual payment of interest on that sum; which can scarcely be called endowments. The authority to raise money by lottery certainly was not; it was a mere privilege granted, which cost the state nothing; and the appropriation of the $30,000 to the liquidation of the debts of the institution, on the payment of interest by the professors of one of its faculties, assumes more properly the shape and character of a loan to a private corporation for its own private purposes, than of an endowment or appropriation of money for the uses or political purposes of the government.

If it is a public corporation, and its members the officers or agents of the government, and the debts contracted in the due course of that agency, they were debts of the state, con-

tracted by its own officers, which the state was bound to discharge, instead of lending money for that purpose, and taking security from the members of one of the faculties for payment of the interest, which will hardly be contended; and certainly the legislature acted upon no such principle.

But it has been urged in argument at the bar, that whenever the *end* is public, the franchise granted to effect that *end* is also public. That here, the *end* was the preservation of life and health, which depend upon the skill of those who minister to the sick, &c. A public *end*, in which the whole public have an interest, and therefore that this corporation is public.

The same might be said with equal propriety of the college of Physicians, and the college of Barbers and Surgeons, in London; where the preservation of life and health was as much the *end* as here; yet it has never been doubted, that they are private eleemosynary corporations. The act incorporating the college of Physicians was, as this, passed on the petition of certain individuals, and the preamble of the act incorporating the college of Barbers and Surgeons, as of this, recites the benefits and advantages accruing to the public from the establishment of such institutions; and each of those statutes imposes a penalty for practising without license, which would seem to give to the corporation more of a public character than this, which has no such provision.

It is not enough to say, that the public has an interest in the skill and learning of physicians and surgeons. The public has a deep interest in the dissemination of learning and useful knowledge; and so it has in the beneficial results to the community of insurance, canal, rail road, and turnpike companies, &c. The uses or objects may, in a certain sense, be called public; but the corporations as distinguished from the uses or objects, are private.

The objects for which almost, if not all corporations are created, are such as the government deems it expedient to promote, upon the supposition that they will be beneficial to the public, and these expected benefits constitute the chief, and usually the only consideration of the grants.

The distinction is between the franchise granted, and the expected beneficial results to the community, from the possession and exercise of the franchise, upon the performance of the implied condition of the grant to exert the rights acquired, in a manner suited to the promotion of the objects proposed. The institution, the bank, canal, rail road, college, &c. from the nature of its particular object, and the interest the public has in that object may, and commonly does acquire, in a popular sense, the character of a public institution; but the corporation, the artificial being composed of natural persons for the management of the affairs of the institution, in contemplation of law is private; as much so as the individuals composing it were, before the act of incorporation imparted to them an artificial existence, with power to take and hold property in that particular form, and for particular purposes, which is all the act of incorporation does, and that only because the particular objects can best be effected in that particular form. But not therefore making the artificial being or corporation an instrument, nor the persons composing it members of the civil government of the country.

Suppose an association of private individuals had contributed funds in real or personal property, for the establishment and conduct of this very University, (which, in legal understanding, would be a private charity,) and had appointed professors, and constituted them governors and managers of the institution, and of the appropriated funds; the objects being the same as now, the promotion of religion, and the dissemination of scientific, literary, and medical knowledge, and the interests of the public in those objects the same; could the governors so appointed be considered public officers, or members of the civil government? and if not, why should the artificial being created by law, and composed of the same persons for the same purposes, thereby become a part of the civil government, and a public corporation? A private charity cannot, by a mere act of incorporation, be made a public one. In the language of Lord Hardwicke, "the charter of the crown cannot make a charity more or less public, but only more per-

manent than it would otherwise be." 2 *Atk. Rep.* 88, and that is the settled law upon the subject.

Again, "a charity may be public, though administered by a private corporation; and to hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions from the time of *Lord Coke.* 2 *Kent's Com.* 273.

Public corporations are to be governed according to the laws of the land, and the government has the sole right, as trustee of the public interest, to inspect, regulate, control, and direct the corporation, its funds and franchises. That is of the essence of a public corporation. But it has no such right in relation to eleemosynary corporations, or the management of their affairs. That belongs to the visiters alone, under the visitatorial power incident to such corporations. *Angell and Ames on Corp.* 410. 2 *Kyd. on Corp.* 174. 2 *Kent's Com.* 299, 300. *Philips vs. Bury*, 1 *L. Raymond in* 2 *Term Rep.* 346, *&c. &c.* And where trustees or governors are incorporated to manage the charity, the visitatorial power is deemed to belong to them in their corporate character. 4 *Wheat. Rep.* 675. *Story J. Phillips vs. Bury*, 1 *L. Ray. in* 2 *Term R.* 346. *Ang. and Ames*, 412. 2 *Kent's Com.* 301.

The Regents of this University are made the visiters by the terms of the act of 1812, the 11th section of which authorizes them to "vacate the seat of the provost or any of the professors," and requires them to meet in annual and other stated meetings, "in order to examine into all matters touching the discipline of the institution, and the good and wholesome execution of their laws." And all the authorities agree that colleges and academies established for the promotion of learning and piety, and endowed with property by public and private donations, are, in a legal sense, equally with hospitals for the relief of the poor, sick, &c. considered and treated as private eleemosynary corporations.

It is the acknowledged law in England, received and acted upon in the courts of this country, and asserted by the ele-

mentary writers. *Phillips vs. Bury*, 1 *L. Ray.* 5, *and* 2 *Term Rep.* 346. *Lord Hale's opinion confirmed by the House of Lords, Dartmouth College vs. Woodward*, 4 *Wheat.* 518. *Allen vs. McKeen*, 1 *Sumner R.* 276. *Society, &c. vs. New Haven*, 8 *Wheat. Rep.* 464, *&c.* 1 *Kyd. on Corp.* 25. *Angell and Ames on Corp.* 2 *Kent's Com. title Corporations.* This then is a private eleemosynary corporation, differing from a college only in degree.

The extent of the property or funds it may have acquired by donation or otherwise is not material; the capacity expressly given to acquire and hold property in perpetuity, for the uses and purposes of its institution, is the same thing, so far as concerns its character as a corporation, as the actual acquisition of it would be. It appears from the statement of the evidence, that it has been endowed to a small amount by private donations, and no donations that it can derive from the bounty of the state would change its character, and convert it into a public corporation.

That a charter or act of incorporation, when accepted, is a contract, is a proposition too self-evident and universally assented to, to be drawn in question, or to require the aid of argument or authority to support it. There is no *dictum* opposed to it to be found in the books; and it would be strange if there was, assuming (what is no where denied, and cannot be,) that the government can compel none to become an incorporated body without their consent; and that acceptance of an act or charter of incorporation, is necessary to the creation of a corporate body. The grant being of the powers and franchises conferred, and the stipulation on the part of the government, that they shall be held and enjoyed on the implied condition, that they are to be exercised in the promotion of the objects of the charter; and the acceptance being an implied undertaking on the part of the grantees, that they will, in consideration of the charter and the franchises granted, perform the condition; which, as it cannot be forced upon them against their will, is necessarily a subject of contract, requiring the concurring assent of the parties respectively

concerned, and ripens into a contract for the fulfilment of the terms of the charter, when that concurrence is manifested by acceptance. In the *King vs. Pasmore*, 3 *Term R.* 97, *Buller, J.* said, "I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the crown and a certain number of the subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place."

The act of 1812, then, incorporating the Regents of the University of Maryland, being by acceptance a contract between the state and the corporation, the organization and continuing existence of which have been recognized by various subsequent acts of the legislature, is it a contract protected by that clause of the Constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts?" This question would seem to have been fully settled by the decisions in the cases already cited, of *Dartmouth College vs. Woodward*, *Allen vs. McKeen, and the Society, &c. vs. New Haven.* The contract on the part of the state is, that the Regents shall have the capacity and right to acquire and hold real and personal property in perpetuity in their corporate character, to sue and be sued, a power essential to the protection and enjoyment of the property they may acquire; to pass ordinances and make fundamental regulations for the discipline and government of the University; as governors and visiters to examine into all matters touching the discipline of the institution and the due execution of their laws, and to amove the provost or any of the professors on impeachment.

It cannot be denied, that the franchises granted by the act of incorporation are vested rights, and can they be taken from the Regents by any act of the legislature without impairing the obligation of the contract, that they shall be possessed and enjoyed by them and their successors in their corporate character? It is very clear they cannot, and that no

act of the legislature of the state can effect that object without the assent of the corporation, if the prohibitory clause of the tenth section of the first article of the Constitution of the United States is applicable to such a contract as this; and no reason is perceived why it should not be held to apply as well to such contract as to any others, considering and treating this as a private corporation. Neither the character or nature of the contracts intended to be protected, nor of the contracting parties is defined. The generality of the prohibition "no law impairing the obligation of contracts," without any description of contract or parties, or any words of restriction, would seem sufficiently to show the intention of an equally general and unrestricted application, and embraces in its letter such contracts as this. It is not meant to be denied that there may be contracts not within the spirit of, and therefore not embraced by this prohibitory clause. But this being a contract clearly within the words of the prohibition, it is for those who would exclude it from the operation and protection of the constitution, to show that a strict adherence to the letter would be so inconsistent with, or repugnant to the spirit of that instrument, as to authorize the making it an exception.

There is no known rule of construction that would justify or permit an exclusion from the operation of the constitution of any contract plainly comprehended by its words, in the absence of any thing to show that it is not within its spirit. What is there to be found in the constitution distinguishing contracts of this description from any other contracts, or tending in the slightest degree to show that they were not intended to be protected? There is nothing in their character to invite such a distinction, but much to invoke the aid of the framers of the constitution; and surely they are quite as worthy of protection as thousands of other contracts, confessedly shielded by the same provision of the constitution.

It has been suggested, that no consideration passed for this grant to give it the binding force of a contract, and that merely voluntary contracts are not within the prohibitory clause of

the constitution. It is true, that the constitution did not mean, nor does it profess to create any new obligations, or to impart efficacy to contracts void in themselves. But it did intend to preserve the obligatory force of valid contracts; and the principle advanced is not applicable to this case, which does not rest in a mere voluntary engagement to grant, but was an actual grant, in consideration of the benefits expressed in the preamble to be derived to the community, of corporate franchises, which are incorporeal hereditaments, considered in law as property, and properly the subjects of grant, involving a contract that the state should not resume, and that the Regents should hold and enjoy the grant, and all the rights derived under it; and it will scarcely be said, that such a consideration, the dissemination of learning and useful knowledge, in which the country has so deep an interest, is not a sufficient consideration, and that the payment of a pecuniary consideration is necessary to the validity of a grant by the state. Would it, or could it be said, that a voluntary donation from the state, by a grant of land to this institution, authorized to receive such donation, would be void, and that the land so given could be taken away again by the state at pleasure, and given to another. If not, neither can the franchises, the incorporeal hereditaments conferred by this act of incorporation, be taken away.

The principle is the same, equally applicable to both, and one is just as irrevocable and inviolable, as the other,—property, though of different descriptions, being the subject of each—among the rights granted, is that of acquiring and holding property in perpetuity; and the state is pledged not only to the corporation, but to all donors to the institution on the faith of this contract; and to revoke it, would be to violate the plighted faith of the state, that it shall remain inviolate. If the state has a right to revoke at will, this grant, it has the same right in relation to rail road, canal, and other corporations, which will not be pretended.

This brief view of the character and legal effect of the act incorporating the Regents of the University, results in the

opinion, that it is a contract protected by the Constitution of the United States, the obligation of which cannot be impaired by any act of the legislature of the state, without the assent of the corporation; and leads to the conclusion, consequent upon that opinion, that the act of 1825, ch. 190, is repugnant to that instrument, and therefore void. It recognizes the organization and existence at that time of the corporation created by that act, and states in the preamble, that the good government and discipline of the University require important alterations in the act of incorporation. It professes to discontinue and abolish the board of Regents, and the members of its several faculties, declaring that the faculties shall consist of professors alone; to appoint a number of persons by name, to be known by "the corporate title of trustees of the University" of Maryland; to invest them with all the powers and privileges before belonging to the corporation of the Regents, with power to elect a vice-president, and to appoint and dismiss the provost, professors, and lecturers, at pleasure; to establish new professorships, and to abolish old ones; and to make by-laws for the regulation and discipline of the institution; declares that the governor of the state for the time being, shall be ex-officio president of the board of trustees; that all the pecuniary concerns of the University shall be under the control and direction of the trustees, who shall have power to appoint a treasurer, and direct and control all expenditures of money; that all money thereafter raised or appropriated for the benefit of the University, shall be paid to the trustees, or to an officer appointed by them to receive it; that all the rights of property then possessed by the Regents, shall vest in the trustees; that vacancies occurring in the board of trustees shall be filled up by the executive of the state, and that, that act should go into effect and operation on the first day of June, 1826,—and it professes to repeal all such parts of the act creating the corporation of the Regents of the University, as are inconsistent therewith. If it is possible to pass an act impairing the obligation of a contract, this is that act, if the act creating

the corporation of the Regents of the University is, in legal understanding, a contract. It attempts to do more than impair the obligation of the contract. Except for the protecting shield held over it by the Constitution of the United States, it would have the effect to annul it altogether, if there be not some inherent principle in the government of the state to forbid it. It not only aims to strip the existing corporation of the Regents of all the privileges and powers conferred upon it by the act of its creation, but to destroy the old corporation, and to create a new one in its place; and to give to the corporation of its own creation, all the same powers and privileges, with additional and important powers—such as the election of a vice-president, the appointment and dismission of professors, lecturers, &c. at pleasure, and the establishment of new professorships, and the abolition of old ones; to cause all money raised or appropriated for the benefit of the University to be paid to the corporation of "the trustees," and to vest in that corporation all the rights of property belonging to the corporation of the Regents; thus not only to deprive the Regents of the capacity to acquire and hold property in perpetuity in their corporate character, but to take from them the property they have already acquired and give it to the corporation of trustees, and to connect that corporation with the political power of the state, by declaring that the governor for the time being shall, ex-officio, be the president of the board of trustees, and that the executive of the state shall fill up all vacancies occurring in the board of trustees.

"It is a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts." 2 *Black. Com.* 37. And by the act of 1812 it is expressly stipulated by the state, that this franchise, the corporation of the Regents of the University, shall continue for ever. And yet the act of 1825 professes, in words, to abolish the board (or corporation) of Regents, and declares that the several faculties shall thereafter consist of the professors alone. It then proceeds to appoint and incorporate a number of other per-

sons by name, to be known and distinguished by the corporate title of "the Trustees of the University of Maryland," and as if that was not enough, concludes with a repealing clause of every part of the act of 1812 inconsistent with its provisions; that is, to suffer so much of the act of 1812 as declares that there shall be an University established to remain in force, but to annul entirely the existing corporation, and to create another, constituted of different persons, to possess and exercise all the franchises (and more) granted to, and the property actually acquired by the former; keeping in mind, that in one case the corporate body, the artificial being composed of natural persons, the Regents, is the corporation attempted to be destroyed; and that in the other, the corporate body, the artificial being composed of other natural persons, the Trustees, is the corporation attempted to be created and substituted in its place, and not the University.

But the objection to the validity of the act of 1825, does not rest alone for support upon the construction of the Constitution of the United States. Independent of that instrument, and of any express restriction in the constitution of the state, there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact, (in this country at least) the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty, and property of the citizen from violation, in the unjust exercise of legislative power.

The legislature has no right, without the consent of a corporation, to revoke or alter its charter, or take from it any of its franchises or property; they are alike beyond the reach of legislative power here, and the high prerogative power of the crown of England, which may create, but cannot at pleasure dissolve a corporation, or without its consent alter or amend its charter.

The parliament of England has been said to be omnipo-

tent. But restrained by public opinion, it has not undertaken to dissolve any corporation since the instances of the suppression of the Order of Templars in the time of Edward the Second, and of the religious houses in the reign of Henry the Eighth, and that power may be considered at this time as resting mainly in theory.

When in 1783, a bill was introduced for the purpose of remodelling the charter of the East India Company, it was successfully opposed by Mr. Pitt and Lord Thurlow, as subversive of the law and constitution of the country; and in the strong language of Lord Thurlow, "an atrocious violation of private property, which cut every Englishman to the bone." And it might be said, that the possession and exercise of such a power by the legislature of this state, would cut every free citizen of Maryland to the bone; not that a corporation is clothed with any peculiar sanctity, or that its property and rights are to be deemed more sacred and inviolable than the property and rights of any private individual. But, because the property and franchises of a corporation *are private property*, regarded as such by the law, and under the safeguard of the same principle, that protects and preserves from legislative violation the property and rights of individuals in their natural character. The law knows no distinction; if one can be invaded, so can the other. Vested, corporate, and individual rights, resting for protection on the same principle, the power to violate the former would necessarily involve the power to prostrate the latter; which would be at war with the purposes for which the social compact was entered into; and the nature and ends of *legislative* power, would furnish no limit to the exercise of it, as it was intended they should do.

To say that the legislature possesses the power to pass capriciously or at pleasure a valid act, taking from one his property and giving it to another, would be in this age, and in this state, a startling proposition, to which the assent of none could be yielded; and yet there is nothing to forbid it, if it is once conceded that they have the power to dissolve one cor-

poration, and take from it its franchises and property, without its consent, and transfer them to another.

But the bill of rights, which together with the form of government composes the constitution of this state, is not silent upon the subject. The sixth article declares, "that the legislative, executive, and judicial powers of government, ought to be forever separate and distinct from each other."

The legislature, executive, and judiciary, are all creatures of the constitution, each confined in its action to the circumscribed sphere assigned it, and cannot rightfully exercise any power which is repugnant to that instrument, or not within their respective sphere of action.

The province of the legislative department of the government is to make laws, confining itself within the limits prescribed by the constitution. It cannot usurp the powers confided to either of the other departments, without violating the declaration in the bill of rights, that they shall be forever separate and distinct from each other, which would be a subversion of the principles that lie at the foundation of the government. For if the legislature could, without control, exercise judicial as well as legislative powers, the tenure of every thing dear and valuable to the citizen, would be, the unrestricted will of that body; to guard against which, the provision was introduced for a division of the powers of the government.

It is not to be presumed that the legislature can ever have a wish, or would intentionally abuse or exceed its just powers. But it may (as it sometimes has done) incautiously and unadvisedly step beyond the strict limits of its authority; and it is the province and duty of a court, when called on judicially to decide upon the validity of the act, to pronounce it void, if satisfied that it is not warranted by the constitution; that being the paramount law to which all acts of the legislature not authorized by it, must yield.

This power and duty of the judicial department were asserted by the late general court in *Whittington vs. Polk*, 1 *Har. and John.* 236, and have been since by this court, in several

cases, among which are *Crane vs. Meginnis*, 1 *Gill and Johns.* 463, in which an act of assembly passed in 1823 divorcing *C. Meginnis* and *Mary* his wife, and directing *C. Meginnis* to pay annually thereafter three hundred dollars to a trustee who is named, for the use of *Mary Meginnis*, was adjudged to be unconstitutional and void, so far as it directed the annual payment by *C. Meginnis* of three hundred dollars to a trustee for the use of *Mary*, on the ground that it was an exercise by the legislature of judicial power. The provision for the payment of the annuity being considered as a legislative decree of alimony, which is recoverable in this state only on proceedings in chancery. And in *Berret vs. Oliver*, 7 *Gill and Johns.* 191, an act of the legislature declaring certain deeds and decrees to be void, and divesting certain persons named of real and personal property held under them, and vesting it in *W. E. Berret*, was pronounced to be a violation of the provision in the bill of rights, "that the legislative, executive, and judicial powers of government, ought to be forever separate and distinct from each other," and of the constitution of the United States, that "no state shall pass any law impairing the obligation of contracts," and utterly null and void.

The act of 1825 is obnoxious to the same objection. It professes to discontinue and abolish the corporation of the Regents of the University; to appoint a board of trustees composed of different persons, under the corporate name of the Trustees of the University of Maryland, "and to transfer to the new corporation thus attempted to be created, all the franchises and property of the corporation intended to be abolished; which, if effectual, would amount to a legislative ouster; a legislative judgment of dissolution; an exercise of judicial power not warranted by the constitution. A sentence of ouster or of dissolution, being strictly a judicial act, for some imputed delinquency ascertained on proceedings at law instituted for that purpose, which, though assuming the garb of a law, the legislature not being invested with a judicial power, is not competent to pass without the consent of the corporation.

The division of the powers of the government proclaimed by the sixth article of the bill of rights, and the twenty-first article of the same instrument, declaring, "that no free man ought to be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or by the law of the land," were intended as restraints upon the legislative power, by means of the courts of justice in which the laws were to be administered, and where all would be entitled to be heard, and have an opportunity afforded them of asserting and defending their rights against any attempted invasion. By "the law of the land" is meant, by the due course and process of the law. *Co. Ins.* in the commentary upon the same words in *Magna Charta.* The general law, prescribed and existing as a rule of civil conduct, relating to the community in general, judicially to be administered by courts of justice. An act which only affects and exhausts itself upon a particular person, or his rights and privileges, and has no relation to the community in general, "is rather a sentence than a law." 1 *Blac. Com.* 44. A sentence that condemns without a hearing, and the very passing of which implies the absence of any general law or rule of civil conduct, by which the same purpose could be judicially affected in a court of law.

If the transferring one person's property to another, by a special and particular act of the legislature, is a depriving him of his property, by or according to the law of the land, then any legislative judgment or decree, in any possible form, would be according to the law of the land, although there existed at the time no law of the land upon the subject, and that too by a tribunal possessing no judicial power, and to which all such power is denied by the constitution. Such a construction would tend to the union of all the powers of the government in the legislature, and to impart the attribute of omnipotency to that department, contrary to the genius and spirit of all our institutions; and the office of courts would be not to declare the law or to administer the justice of the country, but to

execute legislative judgments and decrees, not authorized by the constitution. The act of 1825, therefore, though bearing the form of a law, being in effect a legislative judgment of dissolution of the corporation of the Regents of the University, is, in this view of the subject, unconstitutional and void.

It is not intended by these remarks, to call in question the various general laws for quieting possessions, &c. which the legislature has been in the habit of passing, both before and since the adoption of the present constitution of this state, nor to impeach the decisions upon these laws, which have been considered as resting upon different principles; though it may be that the legislature has sometimes been unadvisedly drawn into the passing of such a law, to effect a particular purpose, not known to and concealed from that body at the time; which, if any such case exists, points to the necessity for great caution in the passing of such a law, and furnishes an additional reason for objection to the exercise by the legislature of judicial power.

In *Norris vs. The Abingdon Academy*, 7 *Gill and Johns.* 7, an act of the legislature vesting the government of the academy in a new board of trustees, was decided by this court to be a violation of the rights of the old corporation, forbidden by the Constitution of the United States, and therefore void. The decision of that case was founded upon the prohibitory clause alone of the Constitution of the United States, which applies equally and with the same force to this, if there be nothing in the facts and circumstances of the case to exempt it from the operation of that instrument.

But it has been strongly urged, that if the act of 1825 was not passed with the previous consent of the corporation of the Regents, there was enough to authorize the inference by the jury of a subsequent assent and acceptance. It is perfectly clear that there was no previous consent, nor any evidence whatsoever offered, tending in any manner to prove such consent. On the contrary, the only evidence relating to that point, was that produced on the part of the plaintiff, with nothing offered on the part of the defendant to rebut it,

or in any way to weaken its force. *First*, the report of a joint committee of the two houses upon which the act was passed. In that report it is stated by the committee, to be their opinion, that the charter of the Regents "is radically defective, and requires fundamental alterations," that the difficulty of getting a quorum of the Regents to meet, and the want of time prevented them from ascertaining the opinion or wishes of the Regents as a body, with respect to alterations of the charter, "that there is nothing in the nature of the act of incorporation which deprives the general assembly of the constitutional power of making the change proposed by them, without the formal assent of the persons incorporated, and that assent is only necessary when a charter of incorporation is in the nature of a contract, as a bank charter, for instance, where a bonus has been stipulated in favour of the state, and where a consideration which would give binding force to a contract, has been paid." That report was adopted, and the changes proposed by the committee, embodied in the act founded upon it. The proceedings then of the legislature, manifestly show that no previous consent had been given; but on the contrary, that the committee charged with that subject, had been unable to ascertain the opinion or wishes of the Regents as a body in relation to an alteration of the charter, and that the legislature had been drawn into an error, and passed the act under the impression made by the ill-founded suggestion of the committee, that in the absence of a pecuniary consideration being paid for it, the charter had not the binding force of a contract, and therefore, that the consent of the corporation was unnecessary. And *secondly*, that on the 17th of March, 1826, soon after the act was passed, (which was on the 6th of March, 1826, at the December session, 1825,) at a regular corporate meeting of the board of Regents, a resolution was adopted with but one dissenting vote, that a committee of five, who were appointed for that purpose, should take the opinion of counsel upon the constitutionality of the act, with another resolution unanimously adopted, directing the committee, if the opinion so

obtained should be that it was unconstitutional, to prepare an address to the governor of the state, and to the trustees appointed for the government of the University, informing them of such opinion, and requesting them to defer acting until the act that had been passed, could be re-considered by the legislature, and in the event of the trustees determining to proceed, to adopt such legal measures as might be deemed necessary to resist the operation of the act. And that the committee having obtained from counsel an opinion that the act was unconstitutional, on the 22d May, 1826, and before the corporation of trustees went into operation, addressed a letter to the governor, and to each of the trustees, advising them of the opinion, and requesting them to suspend measures for carrying the act into operation until an application could be made to the legislature at their next meeting for a repeal of it; informing them, that they were prepared on the part of the Regents to make such arrangements with them as would produce the speediest judicial decision of the question, if they should deem it inexpedient to accede to the proposed delay, and requesting a reply to that communication, which does not appear to have been made. So that, there was not only no evidence whatsoever, of a previous corporate assent to the act of 1825, but an unequivocal subsequent dissent, expressed by solemn corporate acts before it was carried into operation, or the arrival of the time, (the 1st of June, 1826,) when by its own provisions it was to take effect. Which subsequent dissent, and proceedings of the corporation of Regents, independent of the report of the committee of the legislature, precludes the idea of any previous assent, and leaves no ground for presumption or inference of a subsequent assent prior to the 1st of June, 1826, when the trustees, in defiance of the corporation of Regents, and in disregard of its dissent, thus solemnly expressed and formally communicated, organized themselves as a corporation, under the supposed authority of the act of 1825. Still it has been contended, that the conduct and course of the corporation of Regents, after the organization of the corporation of trustees, were such, as to afford

evidence proper and sufficient to be left to the jury, from which to infer the assent from that time, of the former, to the act for the incorporation of the latter, and its acceptance of that act.

It may well be questioned, whether, and indeed it is difficult to perceive how, an unconstitutional act of the legislature, can be made constitutional and valid, by a subsequent acquiescence in it. The whole community "have an interest in preserving the constitutional limitations upon the exercise of legislative power." How can the subsequent approval of, or assent to it, give to the legislature a power, which it did not possess at the time it was passed: and if it cannot, how can it give effect to the act itself, which was passed without authority? But be that as it may, and to proceed: An act of incorporation may be offered for acceptance, and when accepted by those to whom it is offered, it becomes a contract. If the act of 1825 had been made to take effect when, or if assented to by the corporation of the Regents, it would until that assent was given, have been in *fieri;* and when given, a law, if accepted by the trustees; and that would not have been unconstitutional. Parties to a contract have a right to rescind it, and as between the state and the corporation of the Regents, such a provision would have amounted to an offer on the part of the state to rescind the contract of the act of 1812, and if assented to by the corporation, would have been an abrogation of it. But no such offer was made. The act of 1825 was a peremptory and unconditional dissolution of the corporation of the Regents; made by its terms, to take effect with or without its consent, and manifestly passed under the impression, that no consent was necessary.

It is not intended by what has been said, to deny that an act for altering a charter, to the passing of which, previous assent has not been given, can be constitutional, unless it contains an express offer for acceptance, or is made by its terms to depend upon a subsequent assent. The passing of it with nothing more, amounts to an offer only for accept-

ance; and if afterwards accepted, either expressly or by acting under it, it then receives life, and becomes an operative law—as in the cases of the various acts altering or amending existing bank and other charters.

And here it is proper to remark, that the question of acceptance does not, and cannot arise in this case. The act of 1825 did not propose merely to alter or amend the existing charter of the Regents, or to give them another; but to give a new charter to the trustees named. There was nothing therefore for the Regents to accept, or to reject. They could neither reject or accept that which was not offered to them, but attempted to be given to others. The trustees alone had the privilege to reject or accept the act of incorporation that was offered to them—and the Regents were put without the pale of the consideration of the legislature. The question then, is not whether the corporation of Regents accepted the act of 1825, but whether there was any evidence of its having assented to it, after the organization of the corporation of trustees.

It appears that after the trustees had organized as a corporation, all the members of the faculty of physic, and members of each of the other faculties, were appointed, and accepted situations under them as professors; and that, from that time the corporation of the Regents ceased to exert its corporate functions, until the month of September, 1837, and this is considered as evidence to prove the assent of that corporation to the act of 1825.

It is admitted that the acceptance of an act of incorporation by the persons to whom it is offered, or the assent of an existing corporation to an act for an alteration of its charter, may be inferred from facts demonstrative of such acceptance or assent, without the production of a written instrument or vote of acceptance or assent on the books of the corporation; such as in the first case, the fact of actual organization, which furnishes the presumption of previous acceptance, or may be considered, as of itself an act of acceptance, and in the latter, acts and transactions by the corporation or its

authorized officers, in pursuance of the proposed alterations of the existing charter, showing the assent of the corporation to such alterations. But the acts, from which the assent of an existing corporation to an alteration of its charter, may and can alone be inferred, must be corporate acts, acts of the corporation, or acts of its authorized officers or agents. It is a vital principle of a corporate body "that the members are to do no act which may destroy its existence, or injure its privileges." 3 *Desaus.* 574. 2 *Binn. R.* 441. "Particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation." 1 *Black. Com.* 575. *Angell and Ames on Corp.* 107. And "since individual members of a corporation cannot, unless authorized, bind the body by express promises, neither can any corporate engagements be implied from their unsanctioned conduct or declarations, as corporations can be bound only by joint and corporate acts, so it is only from such acts, done either by the corporation as a body, or by its authorized agents, that any implication can be made binding it in law." *Ib.* 130. *Proprietors of the Canal and Bridge Co. vs. Gordon*, 1 *Pick. R.* 297.

If no corporate engagement can be implied from the unauthorized conduct or declaration of individual members, if no implication can be made from them, binding in law upon the corporation, in relation to ordinary transactions, on what principle, can any inference be drawn from them, going to the very existence of the corporation? In this case, the members of the different faculties who accepted situations under the corporation of the trustees, were not in doing so, acting as the authorized agents of the corporation of Regents, nor for any thing that appears, under the sanction of any corporate act of assent to the act of 1825, but in disregard of solemn and express corporate acts of dissent, and protestation against the carrying that act into operation by the trustees—and the law does not permit any inference of assent to that act, by the corporation of Regents, to be drawn from such doings—and more particularly, in the face of its clearly

expressed dissent. The most that can be said of it is, that the individual members who accepted places under the trustees, wanted situations which they were afraid of losing, and acted alone under that impulse. Then, what act, corporate or otherwise, was done by the corporation of Regents, showing or implying, or legally tending to show its assent to the act for incorporating the trustees, and for its own dissolution? It was in full existence and operation when it was passed, as the record shows. It protested against it after it was passed, and requested the trustees not to carry it into execution. That was no act of assent. A number of its members took situations and acted under the trustees, which it could not prevent; that was no assent by the corporation, but by doing so, and withholding themselves from the discharge of their duties as members of the corporation of Regents, though they did not therefore cease to be members, they caused that corporation as a result of the act of 1825, to cease from that time to perform its functions until September, 1837, when the members who had taken situations under the trustees, resigned them, and returned to their duty. During that time it was passive and did nothing, yielding only (as the members who accepted places under the trustees had done) to necessity, and doing no act, from which its assent could be implied, and in the absence of any written instrument or vote of assent, some other act of the corporate body, or of its authorized agent affording the presumption of its assent, should have been produced; and the more particularly, as it is an act not beneficial to the corporation, but one that aims directly at its dissolution, and the presumption in the absence of any express corporate act to the contrary, would rather be against the assent; seeing, that the last corporate act it did, was a vote of express dissent. It was unwilling submission only to legislative power and influence, and not an adoption of its act.

In *Allen vs. McKeen*, 1 *Sumner*, 276, where a corporation passed a resolution that they acquiesced in an act of the legislature, it was decided not to be an adoption of it, but ex-

pressive of mere submission to the legislative will; and that if it could be construed into an approval, it could not give effect to an unconstitutional act. Suppose none of the members of either of the faculties of the corporation of Regents had taken office under the trustees, and they had appointed others and gone into operation; and that the corporation of Regents had by no act assented to the act of 1825, but have become wholly inactive, and performed none of their corporate functions; such non-user, if it would have been deemed sufficient cause of forfeiture, on proceedings at law instituted for that purpose, would have been no evidence of assent to the act; but neglect of duty, or a violation of the implied condition of its contract, for which it would have deserved to be dissolved. But the act of 1825 could not have taken the place of judicial proceedings to work a dissolution, and thereby become valid and effectual. Neither non-user nor mis-user of corporate franchises, has ever been held sufficient to authorize the granting the same franchises to others, before a forfeiture has been judicially declared. And how in principle, does this case differ from that which has been put, supposing for a moment, that the conduct of the corporation of Regents was such as to have furnished sufficient cause of dissolution upon judicial proceedings? But here it is proposed to give effect to an act of assembly, which was passed before any cause of dissolution existed; on the ground that assent by the corporation to that act, arising from a supposed subsequent cause of forfeiture might be presumed; which cannot be against the express dissent of the corporation by a formal vote. An inference of assent by a corporation to an act of assembly, after it has passed, can no more be drawn from a subsequent non-user or mis-user of its franchises, than an inference of consent to its being passed, can be drawn from a previous non-user or mis-user, which is no where pretended; otherwise, there would be no necessity for a judicial ascertainment and declaration of forfeiture, before a new charter can be granted. Nor can effect be given to this act of assembly by considering the non-user by the corporation of Re-

gents, as equivalent to a surrender of its franchises. That can only be done by deed to the state. 1 *Salk. Rep.* 191. *Angell and Ames on Corp.* 507. 2 *Kent's Com.* 311, *et al.* And a court is not warranted to presume a surrender of the corporate rights and a dissolution of the corporation, from a mere intentional abandonment of the franchises, unless there be something in the act of incorporation to justify it; as in the case of some of the incorporated companies in New York, under which, for the sake of the remedy and in favour of creditors, the courts of that state have acted upon such presumption. *Slee vs. Bloom*, 19 *Johns. Rep.* 456. *Briggs vs. Penniman*, 8 *Cowen*, 387. But those cases go no further, and recognize the general rule. And if an actual abandonment of the corporate franchises will not warrant the presumption of a virtual surrender of the corporate rights, and a dissolution of the corporation, how can the assent of a corporate body, to an act dissolving the corporation, be inferred or presumed from a mere non-user of the franchises produced by that very act? and that too, in the face of a corporate act of express dissent, remaining unrescinded on the books of the corporation. In no view, therefore, is it believed, that effect can be given to the act of 1825; and whatever may be the condition of the corporation of the Regents, the trustees have no authority, as governors of the University, under that act.

But it has been again further contended, that the faculty of physic of the University, became dissolved or extinct on the acceptance by the professors of professorships under the trustees, which it is supposed amounted to resignations of their situations as members of the corporation of the Regents; and that by the loss of that integral part the corporation became dissolved, and incompetent to institute or sustain this suit.

The same argument would perhaps equally apply to some of the other faculties; and if either of the faculties was thereby lost, and not restored at the time of bringing the suit, the objection would be fatal to a recovery, whether the corporation was dissolved or only suspended (perhaps more properly the latter) considered as a corporation of integral parts, and

not existing as a corporation *de facto*. But their accepting situations under the trustees, did not, in law, amount to resignations of their professorships in the corporation of the Regents. "An office in a corporation may be resigned in two ways: by an express agreement between the officer and the corporation, or by such an agreement implied, from his being elected to another office incompatible with it." And "to complete a resignation, it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books, or electing another person to fill the place, treating it as vacant." *Willcock on Municipal Corporations*, 14 *Law Lib.* 132, 133, 238, 240. *Angell and Ames on Corp.* 254, 255. It is incidental to the right to appoint. *Ib.*

By an election to "another incompatible office," is meant another office in the same corporation, as is shown by the several examples put in the same books. Here the several members of the corporation of Regents, who accepted offices under the trustees, were not elected to other offices in the corporation of Regents, but to offices in another corporation; and there is no evidence of any acceptance of their resignations by the corporation of the Regents, by any entries in their books, or the elections of other persons to fill their places treating them as vacant, or in any other manner; nor is there any evidence of their having offered to resign. If individual members of a corporation could resign their situations at pleasure, without the consent of the corporation, it would be in the power of any definite integral part of a corporation composed of integral parts, having the right to fill up vacancies in their own bodies, at any time to dissolve the corporation against its will, and even of a mere majority of any such integral part; and thus a corporation so constituted, would be always at the mercy of a minority of its members; and hence the propriety of, and necessity for the rule, that there can be no resignation by a member without the acceptance of it by the corporation; the appointments given by the trustees to members of the corporation of Regents, did not make them

the less, members of that corporation. "Where a new charter which is void, assumes to incorporate a place where there is an existing corporation, and includes the members of the ancient corporation together with new men, if a sufficient number of the ancient corporators, professing to act under the new charter, without any of the new men joining, make a by-law, which they are capable of making under the ancient constitution, their act is referred to their genuine authority, and not to the new charter, and the by-law will be good." *Willcock on Municipal Corporations*, 14 *Law Lib.* 57, 103. 1 *Salk. Rep.* 191. Which shows that the taking a situation under a void charter or act of incorporation, is not a resignation of a situation in another existing corporation, and has not that effect, which is just this case. The acceptance of situations under the trustees, might have furnished ground to the corporation of Regents for removing them, if the power to do so had remained; but that would have been to work a dissolution or suspension of the corporation, if the faculties alone are empowered to fill up the vacancies in their own bodies as has been supposed.

And thus the corporation of Regents was constrained by the act of 1825, and the trustees acting under it to that very inactivity, which is now charged upon it as a fault or as evidence of its assent to that act. Besides, the nineteenth section of the act of 1812, provides, that the charter shall not be avoided or forfeited by any thing done or transacted by the corporation, contrary to the tenor of that act, through oversight, misapprehension, or mistake, either by any court of law, or by the general assembly. The spirit of which solicitude to preserve the corporation, would seem to be, that it should be equally protected against any omission arising from the same cause. And if the corporation could, through oversight or misapprehension, do no corporate act to avoid or forfeit the charter, how could the mistaken course of the individual members of an integral part work that mischief? Or could it have been intended that it should be in their power to dissolve the corporation? Their acceptance, however,

of places under the trustees not amounting to resignations of their situations in the corporation of Regents, and not having the effect to dissolve or suspend the corporation; if there remained to each faculty when they returned to their duty, which was before the bringing of the suit, of those who were members when the trustees took upon themselves the government of the University, a majority of the number of which each should properly be composed, whether residing in Baltimore or not, there was no objection to the competency of the corporation to institute the action. What number did in fact remain does not distinctly appear from the record. But the plaintiff having proved the fact of incorporation, the burden of showing a dissolution of the corporation rested upon the defendant.

These remarks have been made upon the hypothesis, that the corporation is composed of distinct, definite, integral parts. But is that so? The faculties of theology and law, are definite classes, consisting of seven members each. But the faculties of physic and of the arts and sciences, are indefinite parts,—clearly the faculty of the arts and sciences.

In relation to that faculty, the language of the tenth section of the act is, that "the professors of the arts and sciences, (in the plural,) and three others, shall form and constitute the faculty of the arts and sciences." Now, "the professors" may be two, or any larger indefinite number. They cannot, however, be fewer than two, and as there must be three more, that faculty when full, would consist of five at least, of which, three is a majority,—the number that is at least necessary to preserve the faculty. With respect to the faculty of physic, the language used is "that the professors now appointed and authorized in the College of Medicine of Maryland, shall constitute the faculty of physic," without specifying any particular number. But they who were at that time, professors in the College of Medicine, were merely designated as the persons, who should in the first instance compose that faculty, to the exclusion of the president and lecturers. That body, as originally formed, consisted of six members, appointed in

the law itself, for the purpose of organizing and carrying the corporation into operation. But the Regents of that institution were authorized, from time to time, to appoint professors of the different branches of medicine, without limitation as to number; and seeing how many branches there are, it would seem, that the policy of that act was intended to be adopted; leaving the faculty to be composed thereafter, of as many members as from time to time should be thought proper and advisable, according to the condition of the institution; as it was left to the Regents of the College of Medicine, to appoint as many professors, as from time to time might be thought necessary and proper; and seeing too, that seven is designated as the definite number of members, to compose each of the two faculties of divinity and law. But not so with respect to the faculties of the arts and sciences, and of physic, which might require a larger number; which circumstance would seem further to indicate, that the two faculties of physic and of the arts and sciences, were not intended to be definite classes. Nor is it clear that it is strictly a corporation of integral parts. "The members of the four faculties," in the language of the act, being as a whole, the persons incorporated, and by the eleventh section a majority of the whole number of Regents being declared to be a quorum competent to make fundamental regulations for the government and discipline of the University, and to do other corporate business, although every member of any one faculty, and a large portion of another, should be absent from such meeting; whereas, ordinarily, the attendance of a majority of the members of each class, when the corporation is composed of definite integral parts, is necessary to constitute a corporate meeting or assembly. But when this suit was brought, there was in fact a sufficient number of members in each faculty, and whether regularly appointed or not, was not a matter to be inquired of at the trial. No advantage can be taken of any non-user or mis-user on the part of a corporation, by any defendant in any collateral action.

There are two modes of proceeding judicially to ascertain

and enforce the forfeiture of a charter. The one is by *scire facias*, which is the proper process when there is a *legally* existing body capable of acting, but who have abused their power. The other by information in nature of a *quo warranto;* which properly applies, where there is a corporate body, *de facto* only, but who take upon themselves to act, though from some defect in their constitution or organization, they cannot legally exercise their powers. But are entitled to be heard in either case, before they are condemned on proceedings instituted for that purpose, which must be at the instance of the government, and in no other way. For, besides the right of the corporation to a full hearing and judicial judgment of ferfeiture, before it can be stripped of its franchises and property, or be considered as dissolved, the government, with which the contract is made, may not wish to enforce a forfeiture, and may if it chooses to do so, waive the breach of any condition of the contract arising out of the charter.

This principle runs through all the books, and has been judicially enforced in a case in the Supreme Court of *New York*, strictly analogous to this. *The Trustees of Vernon Society vs. Hills*, 6 *Cowen*, 23—where it was determined, that though the trustees were at the time of bringing the suit a corporation *de facto only*, not having been appointed in the manner directed by the charter, it could not be taken advantage of by the defendant without showing that proceedings had been instituted by the government, and carried on to a judgment of ouster. Upon the whole, there is nothing to sustain the objection, that the plaintiffs were not competent to sue at the time of bringing the action, on the ground that the corporation was dissolved by the loss of an integral part.

It may not be amiss here to observe, that whatever may have been the understanding, it is by no means clear, that the power to fill up vacancies in the different faculties by the appointment of new members of faculty, does not as a necessary incident, belong to the Regents in their corporate character, and not to the faculties. The power given to the faculties by the eighth section, being to appoint respectively their own

"professors and lecturers," who may or may not be selected from their own bodies. And when taken from among themselves, clothed in the two-fold character of members of the faculty so selecting them, and also of professors and lecturers. May not a faculty consisting of a definite number, be full, and yet have professors and lecturers appointed by itself, not belonging to it as members of the faculty, but rather as officers or agents? and if so, may not the power "to appoint its own professors and lecturers," look alone to the appointment of persons in that character only, and not as members of the faculty, leaving the power to fill up vacancies in the respective faculties to the corporation of Regents, by the appointment of new members?

The second and third exceptions, and the second and third prayers, in the fourth exception, being abandoned, it is unnecessary to examine them.

And the only remaining question is, whether this suit can be sustained against the defendant for money received by him as the treasurer of the trustees; which arises on the first prayer in the fourth exception. And the opinion of this court is, that the plaintiffs are entitled to recover from the defendant any money amounting to a sum within the jurisdiction of the court below, remaining in his hands at the time the suit was brought; and which was received by him as the treasurer of the persons claiming under the act of 1825, to be the trustees of the University of Maryland, at any time within three years before the suit was instituted, to which they can show themselves entitled as the Regents of the University, or which properly belongs to that institution.—But no sum not received within that time, the act of limitations being pleaded and relied upon by the defendant.

JUDGMENT REVERSED AND PROCEDENDO AWARDED.

THOMAS HAWKINS *use of* ALEXANDER MUNDELL *vs.* CATHARINE BOWIE, *adm'x of* JOHN B. BOWIE.—*June*, 1838.

A writ of error, *coram nobis*, lies to correct an error *in fact*, in the same court, where the record is.

But an error *in law*, which is the default of the judges, the same court cannot correct, by writ of error, or without; such error should be redressed by another court.

The death of the plaintiff before the impetration of the writ, should be pleaded in abatement.

The rejection by the county court, of a plea that the plaintiff is, and was a slave at the time the single bill was given upon which the suit was brought, whether right or wrong, furnishes no ground upon which the same court could reverse its own judgment, by a proceeding in error, *coram nobis*, being, if an error at all, an error in law.

An appeal will lie, from the judgment of the county court, reversing upon error, *coram nobis*, their former judgment, and rendering judgment for costs, in favour of the party suing such writ.

APPEAL from *Prince George's* county court.

This was a *writ of error*, *coram nobis*, to the judges of said county court, sued out on the 1st day of December, 1835, by the appellee suggesting that the said *Thomas Hawkins* for the use of *Alexander Mundell*, by the judgment of *Prince George's* county court, had recovered against the said appellee, as well the sum of $213 current money, a certain debt, as the sum of $42 10, for his costs and charges by him about his suit in that behalf expended, &c.; and because, in the record and proceedings of said judgment, a manifest error, as it is said, hath happened, to the great damage of the said appellee, as of her complaint hath been stated, and as it is right, that the error, if any hath been, should be duly corrected, and full and speedy justice done to the said appellee. *Therefore*, you are hereby commanded, that if the judgment therein be given, then the record and process aforesaid, which in said court now remains as it is said, being inspected, you further cause to be done thereunto, correct that error which of right, and according to the laws and customs of this state, ought to be done.

After an appearance for the *cestui que* use of the judgment

and prayer that the appellee assign errors, the following errors were assigned:

1. That before the entry of the judgment, and also before the impetration of the writ original in this cause, *Thomas Hawkins*, the plaintiff in said suit, was, and for a long time before had been dead, and so the said judgment is erroneous and void.

2. That before the execution of the bill obligatory upon which said suit was brought, the said *Thomas Hawkins* was, and always previous and subsequent thereto had been, and *continued to be a slave for life*, and incapable in law to maintain said suit, and so the said judgment is erroneous and void in law.

At this stage of the cause, the death of the equitable plaintiff was suggested, and Samuel Coe, administrator of *Mundell*, appeared to the cause and pleaded to said assignment of errors.

"That after the rendition of the original judgment mentioned and referred to, &c. there did issue a *scire facias* to revive the same in the name of the said *Alexander Mundell* who claimed the same by assignment, and who was entitled to the proceeds thereof, and upon the said *scire facias* a *fiat* was rendered in favour of the said *Alexander Mundell*, who claimed the same by assignment in his life-time, who was alive at the time of the said *fiat*, and therefore the said defendant says that the said second judgment or *fiat* was properly and legally rendered, and that there is no error therein.

And as to the second ground of error stated in the said petition and declaration, the said defendant says that the same ought to have been pleaded in abatement of the action, and therefore the said defendant demurs thereto, and says that the matters and things therein set forth are not sufficient in law to prevent his having a recovery on said judgment, and therefore the said defendant says there is no error therein or in the rendition of the said judgment, and this the said defendant is ready to verify—wherefore, he prays judgment, &c. the plaintiff in error as to the second ground of error by her above assigned, joined in the demurrer.

The plaintiff in error then, inasmuch as the said defendant hath not rejoined to the said second assignment of error or in any wise denied the same, prayed that the judgment aforesaid might be vacated, reversed, &c.

At the trial of the cause, the parties filed the following statement of facts, viz:

In this case a suit was brought in the name of *Thomas Hawkins*, for the use of *Alexander Mundell*, against *Catharine Bowie*, administratrix of *John B. Bowie*, in Prince George's county court, on the 18th day of March, in the year 1830. At the trial of the case, to wit: at October term, 1831, the defendant pleaded the following plea in abatement, to wit: and the said *Catharine Bowie* as administratrix as aforesaid, comes and prays judgment of the writ aforesaid, because she says, that the said *Thomas Hawkins*, at whose suit the same writ is above supposed to be impetrated, against her, the said *Catharine*, at the time of impetrating that writ, and long before, was dead, and that there is not, nor at the time of impetrating the aforesaid writ against her, the said *Catharine*, was there any such person in being as the said *Thomas Hawkins*, as by the said writ is above supposed, and the said *Catharine* is ready to verify, and therefore prays judgment of the said writ, and that the same may be quashed.

The plea was verified by affidavit, but was rejected by the court, upon the ground that the plea being a plea in abatement, was pleaded too late under the rules of court.

It is agreed that the record now remaining in the court of Appeals, may be used in the trial of this cause, to shew the questions which were there determined. The judgment of the county court, at April term, 1832, the case being continued to that term, which was for the defendant, being reversed by the court of Appeals, and sent back with a procedendo to the April term in the year 1834, the defendant at the trial term, to wit: at the November term, 1835, filed the following pleas: "And the said defendant, by his attorney, comes and defends the force and injury when, &c. and says that at the time of the issuing of the writ original in this

cause, *Thomas Hawkins*, the person in the said writ named as the plaintiff, at the time of the impetration thereof, and for a long time before, was dead, and this, she, the said defendant, is ready to verify; wherefore, she prays judgment of the said writ, and that the same may be quashed," &c.

And the said defendant, by her attorney aforesaid, comes, and with leave of the court here first had and obtained, further defends the wrong and injury, when, &c. and says, that at the time of the making of the bill obligatory aforesaid, the said *Thomas Hawkins*, the person named in the writ original in this cause, as the plaintiff was, and always continued, to be a slave, to wit, at the county aforesaid, and this the said defendant is ready to verify; whereupon, the said defendant prays judgment, if the said plaintiff his action aforesaid to have or maintained ought, &c.

Which, upon motion of the plaintiff's counsel, were not received by the court, and a judgment at that term was entered for the plaintiff, to wit:

Prince George's County Court—November term, 1835.

ALEXANDER MUNDELL, use of Thomas Hawkins,	Procedendo record from the court of Appeals. Pleas filed.
vs.	Rule, Replication *ne recipiatur* to Pleas. Dec. 1, 1835.
CATHARINE BOWIE, Exe'tx of John B. Bowie.	Judg't for pl'tff by default.

The defendant on the same day the judgment was rendered against her, to wit, on the 1st of December, 1835, filed the following petition in this case, to wit:

The petition of *Catharine Bowie*, the above defendant, respectfully represents to the honourable the Judges of *Prince George's* county court, that before the impetration of the original writ in this cause, *Thomas Hawkins*, the plaintiff in said writ mentioned, was, and for some time before the impetration, had been dead; and your petitioner further says, that the said *Thomas Hawkins*, the plaintiff in said suit named, at the time of the execution of the bill obligatory in said suit mentioned, was, and always continued to be, a slave for life. Your petitioner would further shew to your honours, that

a judgment has been rendered against your petitioner, notwithstanding the above facts; and your petitioner would humbly pray your honours, to grant to your petitioner a writ of error, *coram nobis*, to correct the record of said judgment before you remaining, and as in duty bound will ever pray, &c.

State of Maryland—Prince George's County, sct.

On this 1st day of December, in the year of our Lord eighteen hundred and thirty-five, personally appears before the subscriber, a justice of the peace of the state of *Maryland* in and for said county, *Samuel Sprigg*, and makes oath on the holy evangely of Almighty God, that *Thomas Hawkins*, the plaintiff in the suit of *Thomas Hawkins* use of *A. Mundell*, against *Catharine Bowie*, administratrix of *J. B. Bowie*, died some time in the year eighteen hundred and twenty-two; and this deponent further says, that the said *Thomas Hawkins* was born a slave, and continued a slave to the day of his death.

Sworn before JOHN ANDERSON.

Upon which petition the court, on the same day, passed the following order:

"*Mr. Beale*, in the case of *Thomas Hawkins* use of *A. Mundell*, against *Catharine Bowie*, administratrix of *J. B. Bowie*, issue a writ of *coram nobis*, as prayed. C. DORSEY."

And thereupon the defendant filed an assignment of errors. The plaintiff thereupon filed a general demurrer to the assignment of errors; but the court being of opinion that the grounds of error were valid, reversed the judgment, and from that reversal the plaintiff appealed.

It is admitted that the said *Thomas Hawkins*, the legal plaintiff, was born a slave, and continued a slave up to the time of his death, although an attempt was made by his master, the late *Osborn Sprigg*, to manumit him by his last will and testament, which was inoperative in consequence of the said *Hawkins* being above forty-five years of age at the death of the said *O. Sprigg*. It is admitted that *Samuel Sprigg*, the residuary devisee and legatee of said *O. Sprigg*, suffered the said *Hawkins* to go at large and act for himself. It is also admitted, that the said *Thomas Hawkins* was dead be-

fore the commencement of the original suit first herein before mentioned. From the judgment of the county court, reversing the judgment in favour of the plaintiff, as stated in the aforegoing statement of facts, the present appeal is taken by the plaintiff; and the question is, whether that judgment of reversal was right. And it is agreed that this statement of facts shall form a part of the record to the Court of Appeals.

The county court rendered judgment for the plaintiff in error; reversed and annulled the original judgment with costs; and from this the defendant in error appealed.

The cause was argued before Buchanan, Ch. J., Archer, Dorsey, Chambers, and Spence, Judges.

Thomas F. Bowie, for the appellant.

The first question arises on the motion to dismiss the appeal. The county court not only struck out the first judgment, but upon the writ of error rendered another judgment for costs. This is final and conclusive; it settles rights, and from such a judgment an appeal will lie. It is not like the case of striking out a judgment for irregularity, and leaving parties to further proceedings; but the action of the court has here terminated. From every final judgment an appeal will lie; and upon that appeal the court can correct all errors, though not themselves the subject of an independent appeal. *Boteler and Belt vs. State, use Chew*, 7 *Gill and Johns.* 113. This, however, was not a case for a writ of error *coram nobis* at all. Two grounds of error were assigned, both errors of law. An appeal lies for errors in law. Error in fact is corrected by the writ sought in this case. It will correct a mistake of the clerk.

But the facts constituting the error must be properly pleaded. Assignments of error are regulated as pleas are. Errors of fact and errors of law cannot be united in the same assignment; nor two independent facts. I contend the court should not have noticed the assignment. 6 *Com. Dig. Err.* 458, *b.* 3, *p.* 15. *Fitzh. N. B.* 45.

The assignment being informally and badly pleaded, should not have been sustained below. Instead of concluding issuably to the country, it concludes with a verification; but independent of all questions of form, will this writ lie in this cause?

The first ground of error was matter in abatement exclusively. If a defendant pleads over, he waives matter in abatement. 6 *Randolph*, 110, 120. Matter of abatement waived, is not ground of a writ of error *coram nobis*. 10 *Vin. Abrid. Error, B. Pa.* 2, *sec.* 9, 10. A plea to the action, any act in affirmance of the writ is a waiver of this writ. *Grosvenor and Stephens*, 10 *Mod.* 166. 9 *Vin. Ab.* 529, *N. A. sec.* 16.

The second ground is matter either in bar or in abatement, and so not good under this writ. It is, however, in abatement; it is to the disability of the plaintiff. *Arch. Civil Plea.* 299. When matter is pleaded and over-ruled, it cannot be repeated in this form. 10 *Vin. Ab.* 2. *Fitzh. N. B.* 50. 6 *Com. Dig.* 459.

Pratt, for the appellee.

The pleas offered on behalf of the plaintiff in error, in the first cause, in which she was defendant, that the plaintiff in that action, *Hawkins*, was a slave and dead, having been rejected on the ground of being too late under the rules of the county court, and no appeal lying from such rejection, no other remedy remained to correct this erroneous proceeding but the one afforded by the writ of error *coram nobis*. *Marine Ins. Co. vs. Hodgson*, 6 *Cranch*, 217. The remedy is given in this form on the ground of policy. A dead man cannot prosecute a cause. A slave cannot contract. The act of the court deprives us of those defences, and if not remediable in this form, the judgment must remain.

This appeal should be dismissed. The nature of the proceedings demonstrate this. It is an inquiry into facts, and intended to correct errors of fact. 2 *Sellon's Prac.* 400.

Where a court has power to issue a writ to correct its own errors, it cannot be that an appeal lies from a judgment making

the correction. Amendments, grants, or refusals of new trials, which are all of a kindred character to the action of the court in this cause, are not the objects of an appeal. The court below is better able to judge of the propriety of its action on such matters than the appellate court.

Again: an appeal will not lie here, for the judgment is not final and conclusive. It is not a final judgment for the plaintiff. In terms, it restores the defendant and gives costs, but those are merely the costs of the proceedings to restore: a judgment for costs in this particular case. *Boteler and Belt vs. State, use Chew*, 7 *Gill and Johns.* 113. This judgment restores the suit, puts the plaintiff under a new rule to plead, and permits the parties to urge new defences. But suppose the proceedings regular, and the writ properly grantable, and the appeal well taken, then was the decision proper. A slave can make no contract, nor maintain any action. *Hall vs. Mullin*, 5 *H. and J.* 190. 1 *Chitty*, 386. The defence here went to destroy the action. It was a plea in bar. It was refused, on what ground does not appear. That the court did right in refusing the plea is not sustainable. Then no other course was left but the writ of error sued out. 6 *Com. Dig.* 459. 3 *B.* 16. There were two assignments of errors. The first was not answered. To the second, there is a demurrer and joinder. The defence was, plaintiff a slave. The answer in law was, that fact is matter in abatement. We insist it was in bar, and no other remedy left us. 2 *Sellon*, 401. If we have been guilty of duplicity in assigning two grounds of error in one assignment, this is the subject of special demurrer. 6 *Com. Dig.* 462. 3 *B.* 18. The *first* assignment was never tried. No issue was joined on it. No judgment taken on it. Therefore it is not here. A judgment in favour of a dead man is a nullity. No execution can go on it. Administration is necessary to enforce the rights of the dead. But here is a slave; no administration can be granted. The judgment is of no avail, for by no mode of procedure can it be enforced.

J. M. Causin, in reply:

After stating the facts, and adverting to the original proceedings and judgment between the same parties, insisted that it was not until after the rendition of the second judgment that the fact of slavery had been presented to the court as a defence to this action. Five years after the origin of the controversy, it was made the ground of re-instating a cause. The fact alleged was in the knowledge of the defendant in the action from the commencement; and if not availed of in due season, his own *laches* form no ground of complaint.

Pleas in bar, may be put in at any time: if they are refused, the refusal forms a proper ground of exception and appeal. *Union Bank vs. Ridgely*, 1 *Har. and Gill*, 406. The court below upon this writ, proceeded on the ground of error in the previous proceedings—not on the ground of error of fact, or mistake of their clerk.

The decision below prevented the further prosecution of the suit, though not technically a final judgment. *Boteler & Belt vs. State, use Chew*, 7 *Gill and John.* 113. Where a judgment is stricken out, it is error not to enter the continuances, and put the cause in a position for trial; hence, the right of appeal exists here. *Munnikuyson vs. Dorset*, 2 *Har. and Gill*, 378. *State, use Sadler, vs. Cox, Ib.* 382.

But this is not a case for a writ of error *coram nobis*—perhaps this is not a writ of error at all. It is a ministerial writ to correct the errors of the court.

The error of law—refusing to receive pleas must be corrected in another form. 2 *Tidd. Pr.* 1192. Disability to sue is a proper plea in abatement. *Arch. C. P.* 299. A plea which annuls the contract, is in bar, it goes to the merits.

A contract between a *third* party and a slave is not void. It is voidable; it may be good under circumstances. *Hall vs. Mullin*, 5 *Har. and John.* The law only demands that the master should assent to the slave's contracts. The assent renders them valid. The slave was suffered to act for himself. A master permitting a slave to go at large is liable to a penalty; hence a presumption of freedom. In this view,

the contract may have been valid, and the policy of the law is against an examination into the facts at this distant period.

If the pleas rejected were in abatement, the rejection was regular: but the office of the writ of error has been mistaken in this case. 2 *Tidd.* 1191.

Spence, Judge, delivered the opinion of the court.

A writ of error *coram nobis*, lies to correct an error in fact, in the same court where the record is; as if there be error in the process, or through default of the clerk, it shall be reversed in the same court, by writ of error sued thereon before the same justices. *Sellon's Pra.* 399.

But of an error in law, which is the default of the justices, the same court cannot reverse the judgment by writ of error; nor without a writ of error, but this error ought to be redressed in another court, before other justices, by writ of error. *Fitzh. N. B.* 49, 50.

It is our design, in reviewing this cause, to inquire, first, whether the errors assigned fall within that class, which may, according to the rules and principles of law, be revised and corrected by writ of error *coram nobis;* namely, whether they be errors of fact, for such errors only, can warrant the same court to reverse a judgment, because, error in fact, is not the error of the judges. Therefore, the reversing such judgment, is not reversing their own judgment.

The first error assigned was, that before the impetration of the writ original in that cause, *Thomas Hawkins*, the plaintiff in said suit named, was, and for a long time before, had been dead. The fact here assigned for error, was pleaded by the defendant and rejected by the county court, before the judgment; upon the ground, that being a plea in abatement, it was pleaded too late under the rules of the court; this appears by the statement of facts agreed to by the counsel in the cause.

We are of opinion that the death of *Hawkins*, the plaintiff, before the impetration of the writ, was matter proper to be pleaded in abatement. Death of plaintiff before suit, pleaded in abatement. 1 *Chit. P.* 86. All matters of abatement in and before the writ should be pleaded.

But whether the county court properly rejected this plea or not, can have no influence upon the conclusion, for if they correctly rejected this plea, their act could never form the ground of reversal; and if the court erroneously rejected the plea, it was an error of the court, and does not belong to that class, which may be corrected by writ of error *coram nobis;* so that the first error assigned could in no aspect of the case, be a ground for reversal of the judgment in proceeding *coram nobis.*

The second error assigned by the plaintiff in error is, that at the time of making the bill obligatory, the said *Thomas Hawkins*, the person named in the writ original in this cause as plaintiff, was and always continued to be a slave. This plea also was rejected by the county court; on what ground, the record does not inform us; but whether the court were in error or not, cannot affect this decision. If it were error, it was error in law, and manifestly does not belong to the class of errors which may be corrected by proceeding in error *coram nobis*, and surely, if the court were right in rejecting this plea, it cannot be made properly a ground for reversing their judgment.

The only remaining question for our adjudication in this case is, whether the act of the county court brought before us on this appeal, is one from which an appeal will lie.

The court revoked, annulled, and set aside as entirely void, the judgment against *Catharine Bowie*, and restored her to all things which by reason of the judgment she had lost, and rendered judgment in favour of the said *Catharine Bowie* for her costs. Now, if reversing the original judgment and awarding costs to the plaintiff in error in this proceeding in error *coram nobis*, was not so far final as to fall within that class of judicial acts from which an appeal will lie to this court, we cannot see the reason, nor can we well conceive of any remedy the parties would have, if the county courts were to undertake to vacate and annul all the judgments on their records. We therefore reverse the judgment.

JUDGMENT REVERSED.

THE UNION BANK OF GEORGETOWN *vs.* THE PLANTERS' BANK OF PRINCE GEORGE'S COUNTY, MD.—*June*, 1838.

When accounts are rendered by one banking institution to another, according to a proved usage between them, and when it was further proved, that in case either objected to the account of the other, it was the usage for the objecting bank to give notice thereof to the other, in the absence of such objection, the jury may infer that the bank receiving the account acquiesces in its correctness.

The circumstance that the bank receiving the account has suspended payment and general banking operations, can make no difference, when it was in proof that such bank was, notwithstanding, engaged in settling up its business.

When a bank holding deposites has suspended specie payments, the act of limitation runs against the depositors, from the time the fact of such suspension is known to them.

Although the county court may have erred in the direction given by them to the jury, this court will not reverse the judgment, if the party appealing has not been prejudiced by the error.

A party cannot avail himself of the exception in the act of limitations, in favour of accounts between merchant and merchant, concerning the trade of merchandise, without relying on such exception in his pleadings.

APPEAL from *Prince George's* county court.

THIS was an action of *assumpsit*, commenced on the 11th November, 1834, by the appellants against the appellees. The plaintiffs below declared for money had and received; money lent and advanced; paid, laid out, and expended; and upon an *insimul computassent*. The defendants pleaded *non-assumpsit; non-assumpsit infra tres annos*, and *actio non infra*, &c. On these pleas issues were joined.

At the trial of the cause the following exceptions were taken:

1st EXCEPTION.—In this case, the plaintiffs, an incorporated bank of the *District of Columbia*, proved by a competent witness, that between the years 1820 and 1829, inclusive, it had extensive mutual dealings with the defendants, a banking corporation of the *state of Maryland*, consisting of mutual remittances, for collection and credit, which remittances as collected, according to the well established, and mutually understood, usage of banking, were to be by the

party receiving them, credited on its books, to the party sending them, and to be held as deposites, and subject to the drafts of the said last party. That on the 16th December, 1828, and 22d day of August, 1829, the plaintiffs, according to the general banking usage in such cases, rendered to the defendants, in letters of those dates, addressed by the cashier of plaintiffs, respectively, to the cashier and president of defendants, accounts of such mutual dealings in detail. One account commencing April 1st, 1827, and ending December 16th, 1828, and the other extending thence to August 9th, 1829; showing a balance due to, and claimed by plaintiffs from defendants, by first account, of $676.31, and by the second account, of $797.02, which letters were in the following terms:

Dear Sir,—I cover for our credit with you, E. Belt's check on your bank for $485.75; J. R. Magruder's check on your bank for $9; and I enclose a copy of our account, showing a balance due us of $676.31. The account commences April 1st, 1827. I am your ob't,

D. English, *Cashier*.

Union Bank of Georgetown,
August 22d, 1829.

J. R. Magruder, *Pres't Planters' Bank*.

Dear Sir,—I cover a copy of our account since last rendered, shewing a balance due us of $797.02. We have of your notes $2,525, and J. Johnson's check for $22.89. The notes and check sent on Tuesday after you closed. July 25th, I wrote Mr. T. that we had $1,500, and you will see by a prior letter when we had $1,000; when I requested him to retain as many of ours, but received no answer to either. The notes falling due hereafter, I hope you will receive the amount, and transmit the money to us.

And the said president, on the 25th day of last month, acknowledged said letter and account, by the following letter, to wit:

PLANTERS' BANK OF PRINCE GEORGE'S COUNTY,
August 25*th*, 1829.

Dear Sir,—Your two letters of the 22d were received by the mail yesterday. One enclosing a copy of your account, showing a balance in your favour of $797 02. The only note for collection deposited by you, and not overdue, is Sasscer's, due 7–10th September, and this you had better direct to be returned to you, for he may insist upon paying it in the paper of this bank, which I am not prepared to say he would not have a right to do. Ray's draft on J. A. Magruder is not paid. Our board has come to the determination to make no distinction between depositors and bill-holders, under any circumstances. The paper which you hold, I would advise you to deposite, and take a certificate for it. Your account shall be examined and adjusted as speedily as possible; at present we are very much engaged.

In haste, dear sir, yours, very respectfully,

J. R. MAGRUDER, *President*.

Addressed and sent to the cashier of plaintiffs, and since that time the plaintiffs have received no notice from defendants of objection to, or denial of the said account, or any part thereof, or refusal to account with plaintiffs for the claim therein made, until a short time less than three years, before the 11th day of November, 1834, when the present action was brought.

And the plaintiffs then further proved, that, during all the period aforesaid, it was the general, well-established, and recognized usage of banks, in cases of such mutual dealing as aforesaid, that the same should be adjusted and settled in the following manner: one party desiring an adjustment, renders a full account of the mutual dealings between the parties, as exhibited by its books; which account is compared by the party receiving it with its books, and if any discrepancies appear on such examination, a statement of the differences, called a reconciling statement, is returned for explanations to the party furnishing the original account; and so mutual explanations are made and received, backwards and forwards,

by the parties, until all the differences are reconciled, or finally denied. And that it was, and is, the usage and custom of banks to infer and assume, from the absence of any report of differences on an account rendered as aforesaid, the correctness of such accounts; that there *was* no difference as to such usage or custom, when one of the banks had suspended specie payments. And thereupon the plaintiffs prayed the court to instruct the jury that on the proof aforesaid given in evidence, they may infer an acquiescence on the part of the defendants, in the correctness of such original account so rendered as aforesaid by the plaintiffs, although it was also given in evidence by defendants that on the 10th of August, 1829, specie payments were suspended by defendants, and they have not since resumed active banking operations, which suspension was known to plaintiffs in August, 1829, but have confined themselves to adjusting and settling their old business.

The Court, Dorsey, A. J., refused to give the instruction, and the plaintiffs excepted.

2d Exception.—In addition to the evidence contained in the preceding bill of exceptions, which it is agreed shall make a part of this exception, the plaintiffs further to support the issues on their part joined, offered evidence to the jury of a balance, amounting to several hundred dollars due them from the defendants, resulting from the mutual dealings between them as banking institutions, as set forth in said former bill of exceptions terminating on the 8th of August, 1829. And they further read to the jury the following letters; the first two from the plaintiffs to the defendants, and the latter from the defendants to the plaintiffs.—See ante page 440–41.

And also proved, that a few months previous to the institution of this suit, Robert W. Bowie, the president of the *Planters' Bank*, said to the president of the *Union Bank*, that he would submit the account of the *Union Bank* to a board of directors of his bank, but did not admit or deny the correctness of said account. Thereupon the defendants proved, by competent testimony, that at the date of the plaintiffs' letter

of the 22d August, 1829, above referred to, it was known to them that the defendants had suspended specie payment, and discontinued active banking operations, which event occurred on the 10th of August, 1829, as was also proved by the defendants; and they further proved, that a public notice, announcing that fact to the public, was published in the newspapers in the District of Columbia, Baltimore, and Annapolis, at the time, in the following terms:

"Whereas, the very general prevalence of reports injurious to the credit of this institution, have produced such incessant demands for specie, that in the opinion of the board it has become necessary, at least for a period, to suspend the redemption of its paper. In adopting this course, the board of directors consider it their duty to assure the creditors of the institution, that the funds of the bank are, in their opinion, abundantly sufficient to discharge all its obligations, so soon as the same can be made available; and they are also justified in the belief, that the period when this can be effected is not far distant. The board likewise make known to the stockholders that, so far as they can at this time determine of the situation of the bank, they entertain a decided conviction that there will not be ultimately a considerable loss; indeed, they are persuaded there will be none, because it is not believed that the amount of bad debts will be more than equal to the surplus profits. The board, therefore, whilst they earnestly advise the bill-holders and depositors to submit to no sacrifices, feel themselves perfectly warranted in holding out to the stockholders the prospect of full indemnity. It is in contemplation to appoint a committee to investigate carefully the affairs of the bank, and when the same shall be completed, a full exposition of its situation will be laid before the public. *Resolved*, therefore, that, until further notice, the paper of the Planters' Bank of Prince George's County will not be redeemed, and that the president cause this preamble and resolution to be communicated to the public, by inserting a copy in one or more newspapers in the District of Columbia, and the cities of Baltimore and Annapolis, and by putting one at the door of the banking-house."

And thereupon the defendants, by their counsel, prayed the court to instruct the jury that if they should believe, from the evidence in the cause, that more than three years had elapsed between the commencement of the present suit and the termination of all dealings between the plaintiffs and defendants, that in that case the plea of limitations is a bar to the plaintiffs' recovery in the present action, unless the plaintiffs can produce some recognition of indebtedness, or promise, by the defendants, within three years next before the commencement of this suit, or since, to pay the plaintiffs' claim. And secondly, the defendants, upon the evidence, further prayed the court to instruct the jury that the cause of action, if any, in this cause, accrued at least as early as the jury shall find that all dealings between the parties terminated; and if the jury shall find that said dealings terminated three years, or more, before the institution of the present suit, that then the plea of the act of limitations is a bar to the plaintiffs' right of action, unless the jury shall find from the evidence, that within three years next preceding the impetration of the original writ in this cause, or since, the defendants acknowledged an indebtedness to the plaintiffs, or promised or assumed to pay the amount of their claim, or some part of it. Which instructions, so prayed by the defendants, the court granted. The plaintiffs excepted.

The verdict and judgment being against them, they brought the cause to this court, where it was argued before BUCHANAN, C. J., ARCHER, DORSEY, CHAMBERS, and SPENCE, J.

C. Cox, for the appellants.

This is an action brought in the Prince George's county court by the appellants, a foreign incorporated banking company, against the appellees, a domestic company of like character, to recover a balance due on their mutual dealings as bankers, consisting of reciprocal remittances of money, bills, checks, and notes for collection and credit, and which, when collected were, according to the well established usages of

banks and the common understanding of the parties, held as *deposites* for the use of the remitting party, and to be paid over on their *draft*. See 1st and 2d bills of exceptions.

In most of its essential features, the claim of the appellants is similar to that of the Farmers and Mechanics' Bank of Georgetown, against the same defendants, tried at the last term of this court. The counsel, too, in both cases are the same here and in the court below; and in both cases, it was the common understanding of the counsel, and so conceded to the court and jury, that bank deposites are to be paid to the depositor on demand, at the counter of the bank; and with this conceded understanding, both causes were tried below. This understanding of counsel is noticed, in the opinion of this court, in the case tried here at the last term, after both the trials below, and will now be recognized. In the opinion of this court referred to, it is settled that this usage as to bank deposites, will not be judicially recognized without proof. But this court seeing that the usage was, or might probably have been, susceptible of proof, would not be disposed, in the circumstances of this case, to conclude the appellants from the benefit of such proof, did it not sufficiently appear on the record; and, it is submitted, would feel the justice of remitting the cause to the court below under a *procedendo*, that the rights of the appellants might not be sacrificed by reason of a defect influenced by the appellees' concession. It is believed, however, that the record does exhibit competent evidence of the usage; for it is there shown, that the deposites were payable only on the drafts (or checks) of the depositors on the bank.

The question then occurs on the operation of the act of suspension of the defendants, to change the pre-existing fiduciary relation of the parties. The general principle, that such act supersedes the necessity of draft or other demand by the depositor, since the decision of this court already referred to, is become *res judicata*, and is no longer open for discussion. But that decision does not establish that the former fiduciary relation between the parties may not be renewed and conti-

nued, with modifications adapted to the altered position of the suspending bank, so as to prevent, alike, an action and the running of the statute of limitations; and the present position of the banks in general throughout the country, admonishes the court of the mischief that such an extension of the decision might produce, and will constitute a strong argument against it. As is well known, we have in our country a double currency; first the constitutional currency of coin, and secondly, the conventional currency of paper, the convenience of which has caused it for the most part to supersede the use of the other. The great object of banks is to create the paper currency, and it has a credit and value graduated by its convertibility into coin. If immediately convertible, it is of equal value with the coin; if otherwise, it still has a value and credit graduated by the estimate of its ultimate convertibility. This is illustrated by the market of suspended bank paper at different periods of the banking history of the country, both when the suspension has been general, and when it has been only partial. A convention may, therefore, well be entered into between depositor and suspended bank, and be sanctioned by law, whereby the pre-existing fiduciary relation between the parties shall be continued, with the only modification (adapted to the changed position of the bank) that during the period of the suspension, the drafts of the depositor shall only be payable in the paper of the suspended bank, or its equivalent. Such convention may be express or implied. It is by no means unreasonable, in cases like the present, where the ultimate solvency of the suspending bank is unquestionable, and there is a certain demand by the debtors of the bank for such paper to discharge their debts, in which it is to all intents as available as coin. In the absence of any negation by the suspending bank, its accession to such convention is fairly to be inferred; and it is submitted, that it may be fairly held to be a case for the election of the depositor, whether to consider the fiduciary relation as continued or closed.

Here, however, it is submitted, that the mutual accession

of parties to the convention, for the continuance of their fiduciary relation, may be fairly inferred from the record; from the limited extent of the suspension, as shown by the preamble and resolutions of the defendants; from the subsequent correspondence and verbal communication between the parties and their agents; and the transmission and sanction, as shown in the first bill of exceptions, of the mutual accounts. It may be here observed, too, that this preamble and resolution of suspension, extend only, by their terms, to the bill-holders, and not to the depositors of the banks. These discriminations between bill-holders and depositors are common, and many instances are now being exhibited, by different banks of the country. The utmost length, therefore, that the court below could properly go for the extension of the act of suspension to depositors, was to leave it as a matter of evidence and construction for the jury; and so far as any of the instructions, or refusals to instruct, by that court proceed, on the *assumption* of such extension, it is error.

The court's refusal to grant the prayer of the appellants in the first bill of exceptions was erroneous, alike on the proof given of the usage and custom of banks, as on general principles. *Starkie on Evid. pt.* 4, *p.* 37.

The court also erred in the instructions contained in the second bill of exceptions, that without reference to the period of the appellees' suspension, the statute of limitations commenced to run against the appellants' claim from the termination of the dealings between the parties. These last instructions clearly assume to decide peremptorily that the ordinary relation between bank and depositor authorizes an immediate action by the latter without previous demand and refusal of the deposites; and reject in advance any evidence that the depositor might have been prepared to offer, of an usage requiring a previous demand at the counter. If there be error in either bill of exception, the court will reverse the judgment and award a *procedendo*, for it will not undertake to pronounce on the ability of the appellants if not thus interrupted in their proof, to make out their demand by competent

evidence, covering every requisition of the law of this court as settled by the case of the Farmers and Mechanics' Bank of Georgetown.

Should the court hold the aforegoing positions untenable, this alternative view is respectfully submitted:

The appellants are admitted on the record to be a foreign banking company, as the appellees are a like domestic company. These companies are merchants. The term merchant is in England, according to the general acceptation of the word, *confined* to him who buys and sells any commodities in gross, *or deals in exchange:* that traffics in the way of commerce either by importation or exportation; or that carries on business by way of commission, vendition, barter, permutation, or *exchange*, &c. *Beame's Lex. Merc. Ed. of* 1752, *p.* 31. The word merchant, includes every description of traders. *Mayor of London vs. Wilkes*, *Salk.* 445. 12 *Petersdorff*, *Ab.* 614. Drawing and re-drawing bills of exchange for large sums and a continuation of it, is a trafficing in exchange. *Richardson*, *et al*, *vs. Bradshaw*, *et al*, 1 *Atk.* 128. Drawing bills of exchange for large sums is merchandising. *Hankey vs. Jones*, *Cowp.* 746, 751. Now this "*dealing in exchanges*" is one great object of all banks, and as such is recognized and allowed in express terms in every known charter of incorporation. And the accounts in the present case are such "as concern the trade or merchandise between merchant and merchant which are not residents within this province," in the terms of the act of assembly, 1715, ch. 23, sec. 2. *Bond*, *et al*, *vs. Jay*, 7 *Cranch*, 350. In the trial below several issues were submitted to the jury, one, the general issue, and others on pleas of the statute of limitations; and the record shows, that under the former the appellants showed a balance due them of several hundred dollars. On this issue then, the appellants were entitled to a verdict, and the general instructions of the court below, *on all the issues*, that the appellants were not entitled to recover, so far as applicable to this issue, was erroneous. Is this error immaterial? It is respectfully submitted that it is not,

and that on a verdict in favour of the appellants on this issue, they might have claimed a judgment in their favour. It may be admitted that under the issues on the pleas of the statute of limitations, did they stand alone, the appellants could not have given in evidence their character as foreign merchants, and that this should have been made a matter of special replication to the pleas. But the record shows an admission of the character of the appellants as foreign merchants, (under which admission the cause was tried below,) and proof under the general issue of a balance of several hundred dollars due them from the appellees, the result of their mutual dealings as banks in the proper business of banks, which *dealings* were not within the purview of the statute of limitations, but expressly excepted from the operation thereof. It is not the case of a mere personal privilege, as of infancy, &c. where the subject matter is expressly within the statute, but the case shows a claim established to which the issues on the statute of limitations never would be applicable in any circumstances.

J. Johnson and Pratt, for the appellees.

This suit was commenced by the appellants against the appellees on the 11th of November, 1834, and was brought to recover a balance claimed to be due the plaintiffs, upon accounts between them as banking institutions, the last item of which was on the 9th of August, 1829. Five years, therefore, and more, had elapsed, from the termination of all dealings between them and the institution of the suit.

To the declaration which contains the money counts, and an *insimul computassent*, the defendants pleaded *non-assumpsit* and limitations, to which there were issues, and the first question is, whether the statute is a bar to the action.

It is not very clear, that any question upon the act of limitations is in fact raised by the plaintiffs' prayer in the first exception. After offering proof of the claim, consisting of dealings between the parties as incorporated banks from 1820 to 1829, and letters from each to the other, written by their

respective agents, and proof of the usage in the case of such accounts, the plaintiffs prayed the court to instruct the jury, that from such proof they might infer an *acquiescence* by the defendants, in the account rendered by the plaintiffs, which prayer the court refused to grant.

Now, from the frame of this prayer, and the evidence upon which it is founded, it is rather to be inferred, that the purpose of the plaintiffs was to establish the *existence* of their claim, and not to save it from the operation of the statute of limitations.

The plaintiffs first proved, that by their letters of the 16th December, 1828, and 22d August, 1829, they rendered their accounts to the defendants; the last ending on the 9th of August, 1829, and showing a balance then claimed by the plaintiffs, of $797.02. That according to the usage among banks, they, the plaintiffs, had a right to expect, that if any errors were alleged to exist in these accounts, they would be pointed out by the defendants, &c. and that in the absence of such allegation of error, the plaintiffs had a right to assume their correctness; and the amount of their prayer is, that the jury may from this proof do the same thing—that is, may infer the acquiescence of the defendants in the correctness of the plaintiffs' accounts.

The prayer does not assume that such acquiescence will obstruct the running of the statute of limitations, nor does the court say that such will or will not be the case, but simply, that the circumstances adduced by the plaintiffs will not authorize the jury in inferring the defendants' acquiescence in the correctness of the account rendered them by the plaintiffs.

But waiving this objection, and conceding that the question of limitations is presented by this exception, it is insisted that the decision of the county court is perfectly correct.

There is not in this case any evidence of a usage, that the money, bills, or notes, sent to, or deposited with the defendants by the plaintiffs, for collection, were to be paid at the counter of the bank, nor do the prayers assume, nor will the

argument yield any such position. That any usage of the kind is proved is not pretended.

The prayer in the first exception came from the plaintiffs, and for its assumptions the defendants are not responsible; but in fact it assumes nothing in relation to the mode of payment. The defendants' prayers in the second exception are, simply, that limitations are a bar, if the jury find that more than three years had elapsed from the termination of the dealings between the parties and the commencement of the suit, and that the cause of action accrued as early as the jury shall find the dealings did terminate, unless an acknowledgment should be proved.

These prayers, therefore, assume nothing in reference to the mode of payment.

But suppose such to have been the case, this court has already decided, in the case of the Farmers and Mechanics' Bank against the same defendants, that such usage cannot be judicially recognized by the court, without *proof* of its existence; though in that case, the court considered the existence of the usage to have been assumed in the prayers, and yielded impliedly in the argument; neither of which is done here. The observation in the notes of the appellants' counsel, that the counsel for the *Planters' Bank* are the same in this case as in the former, can hardly be of sufficient force to transplant the assumptions of the one case to the other. There would be about as much propriety in taking the facts of that case and putting them to this, because the counsel happened to be the same.

In the case of the Farmers and Mechanics' Bank, the defendants' first prayer was, "that if the jury should find that the dealings between the parties terminated in 1829, and that from that time to the present the defendants had recognized no indebtedness, *but had refused to settle and allow the plaintiffs' claim*, that limitations is a bar."

The Court of Appeals say, that, "the county court was clearly in error in refusing this prayer, the act of limitations being a conclusive bar to the action, *whether the defendants*

have refused to settle or allow the claim asserted by the plaintiffs or not."

And they further say, that the other four prayers in the first exception should have been granted, not upon the special grounds assumed by the prayers, but upon the general effect of the statute, independently of such special grounds.

This decision, it is confidently insisted, is decisive of this case, there being not one single particle of evidence of that usage, from which alone a contrary determination could be anticipated.

But there are other grounds for the affirmance of the judgment of the county court in this case, even if the usage as to payments at the defendants' counter had been proved.

It is in evidence here, that the defendants stopped payment, and discontinued active banking operations on the 10th of August, 1829, and that, that fact *was known* to the plaintiffs on the 22d of the same month and year, being more than five years before they commenced their suit.

In the case of the Farmers and Mechanics' Bank, the defendants in their second exception proved the fact of suspension, but did not prove that the plaintiffs *knew of it;* and, upon that ground alone, this court decided that the defendants' prayer in this exception should not have been granted, upon the assumption of the existence of the usage in reference to payments at the counter; though this court reversed the judgment of the county court even in this exception, because they assumed such usage without proof, which the Court of Appeals say they were not warranted in doing; and the act of limitations being a bar, in the absence of such proof, the defendants' prayer in this exception should have been granted.

In considering the opinion of the county court, in the second exception, in the case of the Farmers and Mechanics' Bank, this court, in the first place, assume, that they are to take judicial notice of the before mentioned usage, and upon that assumption say, that limitations would not run against the plaintiffs, unless payment of their claim had been refused

by the defendants, or some act had been done by the defendants (a knowledge of which is brought home to the plaintiffs) dispensing with the necessity of a demand of payment at the counter of the defendants. And the court further say, that "*such dispensation is abundantly furnished by the acts of the defendants on the 10th of August*, 1829." But this court go on to say, that a knowledge of those acts not being brought home to the plaintiffs, or not with sufficient conclusiveness to justify the county court in assuming the fact, they did right in refusing the defendants' prayer upon that ground.

The acts of the 10th of August, 1829, referred to by the court, were the suspension of specie payments, and discontinuance of active banking operations. These acts, the court say, if known to the plaintiffs, would (even in case the usage referred to was established) dispense with the necessity of a demand at the counter of the defendants, and from the time of such knowledge put the act of limitations in motion against the plaintiffs. In the case now before the court, express knowledge of those acts is brought home to the plaintiffs, as early as the 22d of August, 1829, more than five years before suit was brought, and consequently, even assuming the usage to be proved, the claim is effectually barred.

The counsel for the appellants adverting to the general condition of the banks throughout the country, admonishes the court against the danger of extending the doctrine established in the case of the Farmers and Mechanics' Bank, beyond the limits which the facts of that case render imperatively necessary; and whilst he admits that the question is now no longer open, that a suspension of specie payments by a bank supersedes the necessity of a demand at the counter, either to create the right of immediate suit, or to put the act of limitations in operation, nevertheless contends that other circumstances may arise, which will revive or continue the former fiduciary relations of the parties, and thus prevent the statutory bar from attaching.

Our first answer to this view of the case is, that according to the express language of this court, in the case of the Far-

mers and Mechanics' Bank, mere fiduciary relations between the parties to a suit, will not *per se* prevent the running of the act of limitations. In courts of law, trusts have no force in opposition to the statute, except as indicating the *time* at which the cause of action accrued, as had been before decided in the case of *Green vs. Johnson, et ux*, 3 *Gill and Johns.* 391; in which it was further held that, at law, there was no such head of pleading as trusts.

Our next answer is, that supposing a conventional arrangement between depositor and suspended bank, that the drafts of the former should be paid in the paper of the suspended bank, or its equivalent, during the suspension, (as is supposed in the argument of the appellants' counsel,) and thus render a demand necessary at the counter of the bank of payment in such medium, before a right of action would arise, there is not in this case *a shadow of proof* of any such convention. Before, therefore, the court can adopt any such hypothesis, they must assume the existence of such convention, in the absence of all attempts to prove it; and in addition to that, they must assume that payment in the medium spoken of, was only to be made *at the counter of the bank*, without any evidence of a usage to that effect. And this the court is asked to do, with the fact of their opinion in the case of the Farmers and Mechanics' Bank against these appellees; though in that case, they expressly say, that they can take no judicial notice of such usage without proof; although its existence was impliedly, at least, assumed in the defendants' prayers, and in the argument on both sides in this court.

But apart from these considerations, which are deemed conclusive upon this point, it is not perceived how the present condition of our banking institutions can have any influence upon the decision of this case, even if the court can take judicial notice of their condition.

The suspension of the *Planters' Bank* occurred on the 10th of August, 1829, and the general suspension not until May, 1837. It is difficult to imagine, therefore, how arrangements which are supposed to be the result of a state of things oc-

curring seven years afterwards, can be attributed to the transaction in question. Besides, the *Planters' Bank* not only suspended specie payments, but *she discontinued banking operations*, which of itself repudiates the idea of arrangements applicable alone to institutions continuing in the full exercise of all their functions, but which, from peculiar circumstances, are unable, for a season, to meet their engagements to the public.

But there is another answer to this notion, which must be insurmountable. The *Planters' Bank* had failed, and the *Union Bank*, it is conceded for the purpose of argument, was a depositor, and of course a creditor.

In this state of things the counsel for the appellants supposes, and asks the court to suppose, that an arrangement was made between these two banks, by which the *Planters' Bank* was to retain the money, to be paid on demand at her counter, *in her own notes*. Why, how would this better the condition of the *Union Bank*? The notes of her debtor would be of no more value than a credit upon her books, especially as it appears, from the letter of the president of the defendants, that they had determined to place the note-holders and depositors upon the same footing.

Thus, therefore, the court is asked to imagine a convention, without a tittle of proof; to attach to that a usage, which they have already said they cannot assume without proof; when it is perfectly manifest that the convention, if made, would in no respect have bettered the condition of the creditor. If the probabilities of the arrangement were ever so strong, this court could not, and would not make it the basis of judicial action without proof; and they will hardly do so, when every presumption resulting from its entire futility is against it.

The appellants' counsel does not contend that the proof in the second exception, that the president of the defendants said he would submit the plaintiffs' account to the directors, takes the case out of the statute. That it does not is clear,

from the cases of *Oliver vs. Gray*, 1 *Harr. and Gill*, 216; and *Frey vs. Kirk*, 4 *Gill and Johns.* 509.

There was no acknowledgment of a present subsisting debt, from which a promise could be implied, as is essential, according to those decisions.

The plaintiffs' counsel contends, that if the county court erred, in either exception, this court will send the case down upon *procedendo*. This is not so. If upon either exception, and especially the last, they agree with the defendants, the the case will not be sent back. If the law of that exception is right, the final judgment must be for the defendants. In the case of *Morgan vs. Morgan*, 4 *Gill and Johns.* 395, this court refused a *procedendo*, even when they reversed the judgment of the county court rendered for the defendant, because they said the plaintiff could ultimately recover nothing.

The same thing was decided in *Berry vs. Harper*, *same book*, 467; and in *Green vs. Johnson*, *et ux*, 3 *Gill and Johns.* 389. In this latter case, which was an action of assumpsit, the judgment below was for the plaintiff, but this court being of opinion that limitations which were pleaded was a bar, reversed that judgment, and refused a *procedendo*. That was going much farther than is necessary here, for in this case all we ask is, that no *procedendo* shall be awarded if the judgment is affirmed; and we cannot suppose that a *procedendo* will be ordered, to re-try a case which was decided right, when it was refused when the first judgment was wrong; especially when the form of the action and the defence is precisely the same in both cases.

The appellants' counsel present one other view of this case. He assumes that these two banking institutions are *merchants*, and asks that the exceptions in favour of merchants' accounts be applied to the transactions between them.

Now, in the first place, if the plaintiffs designed to avail themselves of the savings in the act of limitations, in favour of accounts between merchant and merchant, he should have *replied* the savings, and not taken issue upon the plea of limitations, as he has done. 1 *Chitty*, *Pl.* 555.

By taking issue upon the pleas, the plaintiffs "admitted their legal sufficiency and applicability," as this court say in the case of *Green vs. Johnson, et ux*, 3 *Gill and Johns.* 396. And further, that by doing so, "they admitted upon the record that, if true, the verdict must be for the defendants."

But waiving this objection, is it true that merchants' accounts are out of the reach of the act of limitations, *if there be, as here, no item within the prescribed time?* In the case of *Coster vs. Murray*, 5 *Johns. Ch. R.* 522, Chancellor Kent, after reviewing all the cases upon the subject, comes to the conclusion that accounts, even between merchant and merchant, are within the statute, if there be no item within the time limited by the statute.

The Court of Appeals of *South Carolina*, in 1826, concurred with Chancellor Kent. *Angell on Limitations*, 214.

And from the language of this court, in *Green vs. Johnson, et ux*, 3 *Gill and Johns.* 394, it may fairly be inferred, that they are not disposed to increase the number of exceptions.

The appellants' counsel has cited several cases, to show that banks are to be regarded as *merchants;* that all persons having *mutual dealings*, are entitled to the benefit of the exception in favour of accounts between merchant and merchant.

That this exception applies to all persons having mutual dealings, *if the last item of the account is within the prescribed time*, may be admitted; and yet the plaintiffs' claim will not be saved, unless it can be shown that these banks are *merchants* within the meaning of our act of assembly, *and that their accounts concern the trade of merchandise;* for there is no item on either side of the account within three years. It may be admitted, we say, (though the admission is only made for the sake of the argument) that where the parties dealing together are merchants, and the subject of their dealings merchandise, that it is not necessary that any one item in the account should be within three years; in other words, that such accounts are not embraced by the statute; and yet, as these banks are not merchants, nor the subject of their dealing merchandise, the

claim is barred by the statute, there being no item within three years.

All the cases upon the subject show, that where the accounts are not between merchants, strictly so called, and the account does not concern the trade of merchandise, there must be some one item within the time to preserve those which are not, from the bar of the statute. The court will find the distinction between the mutual dealings of parties who are not merchants, and those accounts which concern the trade of merchandise between merchants, spoken of in *Angell on Limitations*, 205, 206. And that it is only in reference to the latter, that it has ever been decided that there need be no one item within the time limited, to save the rest of the account from the statute. Unless the parties are merchants, and their accounts concern the trade of merchandise, some one item within the prescribed period is indispensable. If there be none such, the whole claim is barred; and that being the case here, the effect of the plea would not be removed, even if the plaintiffs, *by their pleadings*, had put themselves in a position to raise the question, which they have not done.

The case of *Bond, et al, vs. Jay*, 7 *Cranch*, 350, was between *merchant* and *merchant*, and concerning the trade of *merchandise*, strictly so called, and the exception was presented by the replication to the defendants' plea of limitations.

Suppose we are in error upon this point, and the plaintiffs might have availed themselves of the exception in favour of merchants' accounts, by their declaration or a special replication to the plea of limitations, this court will not, if the judgment of the county court was right upon the questions decided by them, remand the record, for the purpose of enabling the plaintiffs to amend their pleadings.

In the case of *Watchman & Bratt vs. Crook, et al*, 5 *Gill and Johns.* 239, an application of the kind was refused after argument.

But it is said, that if the plaintiffs' prayer in the first exception ought to have been granted, the court was clearly

wrong in instructing the jury *upon all the issues against them. No such instruction was given.* In the first exception, the court simply refused the plaintiffs' prayer; and in the second, granted those of the defendants, which asserted that the claim was barred by limitations, if the jury from the evidence believed certain facts.

The prayers refer *exclusively* to the operation of the act of limitations, and the court granted them in the terms in which they were asked, without the slightest reference to any other issue.

Upon the first exception, the appellees' counsel would make this additional remark. If the omission of the defendants to point out errors in the accounts transmitted them by the plaintiffs, is evidence of acquiescence, as is insisted by the plaintiffs, then their claim rests upon an account stated, and as such is barred by limitations, even if they are viewed as merchants, and the account concerning the trade of merchandise, within the strict sense of the statute. *Freeland vs. Herron, et al,* 2 *Cond. S. C. R.* 449. *Angell on Limitations,* 199.

Archer, Judge, delivered the opinion of the court.

We think the court were in error in the first bill of exceptions, in not granting the plaintiffs' prayer; that the jury were at liberty to infer from the silence of the defendant, their acquiescence in the correctness of the account rendered by the plaintiffs to the defendants.

These accounts, according to the proof offered in this exception, were rendered to the defendants according to the usage as proved, and as it was further proved, that in case there should be any exception taken to the accounts, such exception or disagreement, was, by usage, notified to the plaintiff, and no such notification being given, it was a reasonable inference, that the defendant thus receiving the account, had acquiesced in its correctness, and the inference was the stronger in this case, as according to the practice and usage of the banks, in case of failure, to notify differences in the respective accounts of the banks, for the bank trans-

mitting its account, to infer that it was not objected to, and was admitted to be correct.

The suspension of specie payments in August, 1829, and the declension of banking operations from that time, by the defendants, can make no difference in the sufficiency of the evidence, to enable the jury to draw the deduction sought by the plaintiffs, as it was in evidence that the defendants, *The Planters' Bank*, were engaged after the suspension, exclusively in the settlement and adjustment of their business, and the plaintiffs had a right to expect the observance of the usage in regard to the settlement of their mutual accounts, notwithstanding they had suspended banking operations, as they were still engaged, and exclusively engaged, in the settlement and adjustment of their accounts.

The second bill of exceptions arises on the statute of limitations. The defendants pleaded *non-assumpsit; non-assumpsit infra tres annos;* and *actio non-accrevit infra tres annos.* The plaintiffs took issue on the first plea, and issue was joined on the second and third pleas; so that the only questions the jury had to try, or which could legitimately be submitted to them, were, whether the defendants had assumed to pay the claim; whether they had assumed to pay within three years; and whether the action had accrued within three years anterior to the institution of the suit.

There is certainly no evidence in any of the bills of exceptions, of any admission by the defendants, which could prevent the running of the statute.

The claim of the plaintiffs consists of remittances for collection, and of credits, which according to the usage as proved, when collected, were placed to the credit of the bank sending; and to be held as deposites, liable to draft. The defendants, *The Planters' Bank of Prince George's County*, suspended payment on the 10th of August, 1829, and by the letter of the cashier of the defendants, dated 25th August, 1829, the plaintiffs are informed, that the defendants had resolved to make no distinction between depositors and billholders: and it is in evidence, that this suspension of pay-

ment, was known on 22d August, 1829, to the plaintiffs. The time then from which the statute of limitations would commence running, according to the opinion of this court, in *The Farmers' and Mechanics' Bank of Georgetown vs. The Planters' Bank of Prince George's County*, would be the period when the plaintiffs *first* had knowledge that the defendants had suspended specie payments: and not the period when the transactions between the parties terminated, as assumed by the court in their directions to the jury.

The dealings between the parties terminated according to the evidence on the 9th day of August, 1829. The court were therefore in error in instructing the jury that the cause of action accrued, at least, as early as the jury should find all dealings between the parties terminated, and that limitations commenced to run from such period instead of dating the commencement of the running of the statute, from the day when the plaintiffs *first* had knowledge of the suspension of payment by the defendants.

But the plaintiffs, from the evidence in the cause, were clearly barred of their action, more than three years having elapsed from the date of knowledge by the plaintiffs of the suspension of payment by the defendants: and the plaintiffs are in no manner, therefore, prejudiced by such erroneous direction. For, whether the one period or the other be assumed, as the day from which to date the running of the statute, the plaintiffs are equally barred. Nor do they receive any prejudice by the erroneous refusal of the court to grant their prayer contained in the first exception, for, by the evidence in the cause, their claim was clearly barred by limitations.

If, as is supposed, this were a case of accounts between merchant and merchant, concerning trade and merchandise, to have availed themselves of it, the plaintiffs should have specially replied the fact to the defendants' plea; until this was done, the disclosure in evidence of the fact, could have no effect on the issue which the jury were sworn to try.

JUDGMENT AFFIRMED.

JOSEPH HOLLMAN *vs.* THE WILLIAMSPORT AND HAGARS TOWN TURNPIKE COMPANY.—*June*, 1838.

The omission of commissioners, appointed to make a location and plat of a road, to take the oath prescribed by the charter of the company, will not exonerate the subscribers to the stock from the payment of their subscriptions, it not appearing that they were injured by such omission.

Nor will the subscribers be exonerated, if the road is not made as wide as directed by the charter, when no injury appears to have resulted from the change.

APPEAL from *Washington* county court.

THIS was an action of *assumpsit*, to recover the instalments on certain shares of stock in the company of the appellees, to which the appellant was a subscriber.

The cause was before the court at June term, 1836, see 8 *Gill and John.* 75, and came up as before on the general issue.

At the last trial, the following exceptions were taken:

1. The plaintiffs to maintain the issue on their part, offered in evidence an act of assembly of the State of Maryland, passed on the 2d of March, 1833, entitled, "an act incorporating a company, to make a turnpike road from Williamsport to Hagars town. They further offered in evidence, a book, entitled, "Subscriptions to the capital stock of *The Williamsport and Hagars town Turnpike Company*," which subscriptions were taken by the commissioners appointed by the said act, to which book was annexed the act of assembly aforesaid, and which book contained the subscription to the names of the subscribers to the capital stock of the said *Turnpike Company*, to wit: "We whose names are hereunto subscribed, promise to pay for the stock subscribed by us respectively, according to the provisions of the charter of the *Williamsport and Hagars town Turnpike Company.*"

It was further proved by the plaintiffs, that the defendant had subscribed on the 3d June, 1833, in said book, for twelve shares of the capital stock of said company, by the names of *Joseph Hollman, Benjamin F. Hollman, John H. Hollman,*

and *Joseph Hollman, Jr.* and that at the time of subscribing he had paid the sum of one dollar on each share thereof so subscribed. That the managers for said company were duly elected, in pursuance of the provisions of said act, on the 2d September, 1833, and that said managers had called in said stock so subscribed, in three instalments of five dollars each, on each share of said stock; of which several calls the managers aforesaid gave two months previous notice, by advertisements in one newspaper, printed in *Williamsport*, and one newspaper printed in *Hagars town*, agreeably to the provisions of said act. That three commissioners were appointed on the 5th September, 1833, for the purpose of making a location and plot of said road, agreeably to the provisions of the 9th section of said act of assembly, and that the said commissioners did make a location and plot of said road, which plot was returned and reported to said managers on the 23d October, 1833. That the said managers had made, and completed said road, and reported the same to the governor of the state of *Maryland*, in pursuance of said charter, and that examiners were appointed by the governor, to view said road and report thereon: and that said examiners did report to said governor, that said road had been constructed agreeably to the provisions of said act of assembly, and that afterwards, the said governor issued his license to said *Turnpike Company*, authorizing them to erect gates on said road, for the purpose of demanding and receiving tolls for the travelling on said road.

It was further proved by the plaintiffs, that at the time the change aforesaid was made in said road, by the managers thereof, there was no power given by the said charter to condemn lands for the use of said road; that the said company were anxious to proceed with the construction of said road, which they could not have done without first obtaining a supplement to said charter. That when the said commissioners proceeded to locate said road, the agent of an owner of land over which said road was located, stated, that if the

road was located as commissioners contemplated, there would be, he thought, no objection made to said location, nor would the land cost the company any thing: he finally refused to suffer said location to be made, and stated, that if said location should be pursued, that he would charge the company eight hundred or a thousand dollars for said land.

That the whole of said road, from about a mile west of *Hagars town* to *Williamsport*, occupied the bed of an old county road, which was only sixty feet wide, and which did not subject said company to any expense, which the commissioners and managers deemed sufficiently wide. That if they had laid out the road six feet wider they would have subjected the company to considerable expense for land. That by the alteration of said road by the managers, it was made at the place so altered, perfectly straight. That said road was stoned twenty-one feet as required by said charter.

It was proved on the part of the defendant, that after said road had been located, and a plot thereof returned by said commissioners, that the managers of said *Turnpike Company* changed said location at one part of said road, near the town of Williamsport, and departed from the location as laid down by said commissioners, for about the distance of forty or fifty perches, but which change did not alter the termination of said road in the town of Williamsport.

It was further proved by the defendant, that he was injured by said change of location by said managers as a stockholder, and also in respect to property which would have been greatly enhanced in value if the road had been made on the location marked out by the commissioners.

The defendant further proved, that the road as made by the managers and returned by them to the governor, as required by the said act, although it shortens the distance of said road, was not made in the cheapest and best direction, nor was it as short, in point of time, but was the most expensive, and that the managers had to obtain a larger subscription of stock, to enable them to finish the road so changed by them—which road, so changed, was done by an order of

a majority of said managers. It was further proved by the defendant, that the commissioners so appointed as aforesaid, did not take the oath prescribed by the ninth section of said charter.

The defendant further proved, that he entered a protest against this change of location, at the time the president and directors made this change, and never gave his acquiescence to said change. That the commissioners so appointed as aforesaid, did not lay out the said road sixty-six feet wide, as required by the *tenth* section of said act, but only sixty feet, and that no road ever has been made by the president and directors sixty-six feet wide, as required by the tenth section of said charter.

Whereupon, the defendant prayed the court to instruct the jury, that if they should be of opinion from the evidence in this cause, that the three commissioners appointed by the president and directors of said company, did not take the oath prescribed by the ninth section of said charter, but proceeded to make and locate said road without taking said oath, that then the road is not located agreeably to the provisions of said charter, and the plaintiffs are not entitled to recover. Which opinion and direction the court (*T. Buchanan, Ch. J.*) refused to give to the jury, and the defendant excepted.

2d Exception.—Admitting the facts as stated in the first bill of exceptions, the defendant, by his counsel, prayed the court to instruct the jury, that if they should be of opinion that the commissioners did locate said road agreeably to the provisions of said charter, and that the said managers changed such location, and constructed a road upon a location different from that marked out by said commissioners; that such change of location by said directors was unauthorized by the charter, and the plaintiffs are not entitled to recover. Which opinion and instruction the court refused to give to the jury, and the defendant excepted.

3d Exception.—Admitting the facts as stated in the first bill of exceptions, the defendant, by his counsel, prayed the

court to instruct the jury, that if they should be of opinion that the road made by the directors was not made in the "*nearest and best direction from the eastern limits of the town of Williamsport, to the town of Hagars town, and that the defendant was injured thereby*," that then the plaintiffs are not entitled to recover. Which opinion and instruction the court refused to give to the jury, and the defendant excepted.

4th Exception.—Admitting the facts as stated in the first bill of exceptions, the defendant, by his counsel, prayed the court to instruct the jury, that if they should be of opinion that the commissioners did not locate the road according to the provisions of the tenth section of said charter, which required them to lay and locate said road sixty-six feet wide, or the managers did not make said road sixty-six feet wide, that then the plaintiffs have not made the road authorized by their charter, and are not entitled to recover. Which opinion and instruction the court refused to give, and the defendant excepted.

5th Exception.—Admitting the facts as stated in the first bill of exceptions, the defendant, by his counsel, prayed the court to instruct the jury, that if they believe from the evidence that the said road was not located by said commissioners sixty-six feet wide, or that said road was not constructed sixty-six feet wide by the directors, that then this is not the road to which the defendant subscribed, and therefore the plaintiffs are not entitled to recover. Which opinion and instruction the court refused to give, and the defendant excepted.

The verdict and judgment being against the defendant, he appealed to this court.

The cause was argued before Buchanan, Ch. J., Stephen, Archer, Dorsey, Chambers, and Spence, Judges.

By J. Spencer, for the appellant, and

D. G. Yost, for the appellees.

Stephen, Judge, delivered the opinion of the court.

Most of the questions involved in this case have, we think, already been decided by this court, when it was brought here upon a former occasion, and the present appeal can scarcely be said to have given a new aspect to it. The only new questions raised by the several bills of exceptions, are those which relate to the omission by the commissioners to take the oath required by the act of incorporation, before they located the road, and the making of the road *sixty*, instead of *sixty-six* feet in width, as prescribed by the charter. The court below we think decided correctly in overruling the defence founded upon these objections. It does not appear that the appellant has sustained any injury in consequence of these omissions; and we have already decided, upon the admissions of the parties upon the former appeal, which are not materially varied by the proof now presented, that the change in the location of the road, as made by the managers, was not such an infringement of the provisions of the charter, as would entitle the defendant to resist the payment of the amount of his subscription. The company, in making the road, appear to have consulted the interest of the stockholders, in making it on the bed of an old county road, which cost them nothing; and thereby saved a considerable expense, which otherwise must have been incurred. The case referred to in *Massachusetts Rep.* has no analogy to the present controversy, because, though the direction of the road was altered in that case, the road made was entirely and altogether different from the one originally contemplated, and the contract was thereby changed. We think the judgment of the court below ought to be affirmed.

JUDGMENT AFFIRMED.

FREDERICK L. E. AMELUNG AND OTHERS *vs.* ALBERT SEEKAMP.—*June*, 1838.

The principles and powers of the court of chancery in England at the time of the revolution, not altered by our legislation, nor inapplicable to our political institutions, are the same by which the court of chancery of Maryland is governed.

An injunction will not be granted in England to restrain the commission of a mere trespass; nor will an injunction for that purpose be granted in Maryland, pending proceedings at law to try the right, except in cases of irreparable mischief, or to prevent a multiplicity of suits, or where peculiar circumstances imperatively demand such a conservative remedy.

The mere allegation of a complainant, that irremediable damage or irreparable mischief will ensue, is not sufficient; but to entitle the party to an injunction, the facts must be stated, to shew that the apprehension of injury is well founded.

THIS was an appeal from the equity side of *Baltimore* county court, from an order granting an injunction, and an order continuing the same on the motion to dissolve.

On the 4th December, 1837, *Albert Seekamp* exhibited his bill, alleging that he was seized in fee of several parcels of land situate in *Baltimore* county, together with all and every the rights, privileges and advantages to the same belonging; that the said parcels of land are improved with valuable grist and saw mills; that at the time his title accrued, to wit: in 1828, and for more than twenty years, and immemorially theretofore and since, the owners and occupiers thereof were used, and accustomed to have and enjoy, and did have and enjoy, a certain ancient private road or way therefrom to the *old Liberty road* in the county aforesaid, through and over the tracts or parcels of tracts of land, situate between said *old Liberty road*, and the pieces or parcels of ground aforesaid; that within the present year a certain *F. L. E. Amelung*, *Joseph Jamison*, and *James L. Ridgely*, being jointly or severally in possession of the tracts or parcels of land over and upon which lieth the said ancient road or way, have hindered and obstructed him in his use of the same, to the said *old Liberty road*, from his property aforesaid; so that he, the complainant, hath been obliged to institute his action of tres-

pass on the case against them to recover damages for said obstruction and hindrances; that notwithstanding complainant's action at law, and his ancient right, the said appellants do still hinder and obstruct, and threaten wholly to hinder and obstruct his said exercise of the right of passage over and upon said way, from, &c. as aforesaid, whereby great and irremediable damage will accrue to him, his mills aforesaid being thus wholly cut off from their ancient and accustomed outlet, and forasmuch as complainant is remediless at law. Prayer for injunction and subpœna, &c.

This bill was accompanied with a certified copy of the docket entries in the action at law, and thereupon the court (*Magruder, A. J.*) ordered, that upon the filing of a bond with security, to be approved by this court, or a judge thereof, in the penalty of $1,000, with the usual condition to prosecute with effect, and with the further condition to pay all damage which may arise or happen from the issuing the injunction now about to be ordered—that an injunction issue as prayed, with the usual liberty for the defendants, or any of them, to move at any time, upon one day's notice, either for a new and additional bond, with a larger penalty, or for additional security, or both, and that the defendants be served with a copy of this order with the writ of injunction.

The complainant filed his bond, and a writ of injunction issued, prohibiting the defendants from obstructing the said road.

The defendants answered this bill, after which testimony was taken; but the view finally taken of the nature of the writ of injunction by this court, renders, in the opinion of the reporters, the insertion of either answer or proof unnecessary.

Upon the motion to dissolve, Baltimore county court (*Magruder, A. J.*) passed the following order:

The only doubt which I have entertained in this case, has been, whether the complainant ought not, in conformity to the established principles of law in *England*, to settle his right at law, where his title is controverted by the defendants' answer. There it is necessary that the individual complain-

ing of the injury, such as is alleged by the complainant in this cause, should have had his rights first established at law, but here in *Maryland*, where an action or proper proceeding has been instituted in analogous cases, to try the right, an injunction is always granted, and according to the decisions of the court of chancery for a long time passed, ought to be continued until the right has been determined at law, or in some other regular mode, as by an issue directed out of chancery. In *Maryland* it seems to be settled by the decisions of three successive chancellors in cases analogous in my judgment, to the case now under consideration, that contrary to the usual rule in all other cases of injunction, it is no sufficient answer for the defendant to deny positively, the validity of the complainant's title. The injunction will be continued, notwithstanding such denial. It is sufficient that the complainant claims under colour of title—the injunction will be continued in such case pending the proceedings at law to try the right.

I cannot perceive the distinction attempted to be drawn by the arguments of counsel between the cases of ejectment, (where injunction to stay waste pending the suit at law instituted to try title and location was granted,) and that now under consideration. The complainant sets up an uninterrupted adversary user of an ancient private way across the lands of defendants, for a length of time, which (if the fact be so) gives him as complete a title to the road as if he had obtained a deed therefor, and as an easement of that description is susceptible of, and he sets up possession of that road as far as he can, from the nature of his title, have possession—he alleges that he will, if not relieved by the interposition of a court of equity, be subject to all the mischiefs and injury to which a party claiming land would be, pending an ejectment brought by him to try the title, and asks relief adapted to his case, pending the proceedings at law, which he has instituted to try his right. I think he is entitled to it. The court may in the *interim*, upon a proper foundation being laid, make some provision, the best that can be, for the parties. If fur-

ther indemnity is asked by the defendants, as, for instance, an increase of the penalty of the injunction bond or additional security, it will be considered, on a proper application being made, supported by affidavits. Upon the whole, the complainant's title being positively averred in his bill, although denied by the answers, and he having brought his action at law to have that title authenticated and sustained, must, as I think, under the practice in *Maryland*, have relief from this court as a court of chancery, by the continuance of the injunction issued in this cause, until the right to the road is decided at law, or at least until further order. It is therefore, this tenth day of March, 1838, ordered and adjudged, by Baltimore county court, sitting as a court of equity, that the injunction heretofore issued in this cause, be, and the same hereby is continued until the further order of this court.

The defendants appealed, and the cause was argued before Buchanan, Ch. J., Stephen, Archer, Dorsey, Chambers, and Spence, Judges.

Mayer and Glenn, for the appellants, cited:

3 *Bro. Chan. Rep.* 481. 2 *Stor. Com.* 204. 6 *John. C. R.* 19. 9 *Wendell*, 577. 1 *Mad. C. P.* 157. 8 *Con. Eq. Rep.* 336. 3 *Paige Rep.* 213. 1 *Hopk.* 347. 7 *Serg. & Low.* 528. 6 *Serg. & Low.* 524. 3 *Saund. R.* 175. (*d*) 3 *East.* 294. 5 *Taunt.* 125. 4 *Law Lib. Woolrick*, 12, 70. 17 *Mass.* 448. 9 *Serg. & Low.* 324. 5 *Pick.* 421. 8 *Pick.* 504. 2 *Swan.* 338. 1 *Taunt.* 206. 5 *Har. & John.* 478. 2 *Gill & John.* 173. 7 *John. C. R.* 332.

J. Mason Campbell and R. Johnson, for the appellee, cited:

1 *Serg. & Low.* 118. *Beam. Plea. Eq.* 217, 218. 18 *Ves. Jr.* 186. 1832, *ch.* 302. 3 *Paige*, 213. 9 *Wend.* 577. 6 *John. C. R.* 439. 8 *Cowen*, 334. 1835, *ch.* 380. 8 *Pick.* 509. *Wright and Freeman, Har. & John.* 3 *Saund.* 175. (*d*) 27 *Serg. & Low.* 192. 5 *Pick.* 421. 8 *Pick.* 504.

DORSEY, Judge, delivered the opinion of the court.

In *Snowden vs. Noah*, 1 *Hopkins' Ch. Rep.* 353, it is stated as a general principle, that the writ of injunction is a most important remedy; but it is only used to protect rights which are clear, or at least free from reasonable doubt. And in 1 *Mad. Ch.* 157, it is asserted, in like manner, that in the case of a private nuisance, it seems necessary that a judgment at law, ascertaining the rights of the parties, should be obtained previous to an injunction. And the same principle is recognized in 8 *Con. Eq. Rep.* 336, except in cases where the injury is irreparable. But it is insisted that an injunction is always granted and continued in *Maryland*, to stay trespass, pending litigation at law to try the title to land; and that the same remedy should be applied for the protection of the right now in controversy.

Before we admit the truth of this conclusion, let us inquire whether the premises upon which it is founded be true. The principles and powers of the court of chancery in *England*, at the time of the revolution, not altered by our legislation, nor inapplicable to our political institutions, are the same by which the court of chancery of *Maryland* is governed. Is such a preventive power exercised by the English court of chancery is then the first question to be examined?

For the exercise of such an abstract power, not an *English* authority can be produced; whilst the authorities there, are uniform and numerous, that no injunction will lie to restrain the commission of a mere trespass. That a simple trespass by a stranger or person claiming title, unless productive of irreparable mischief or ruin, or to prevent a multiplicity of suits, or required by some peculiar circumstances, is no ground for the issuing of an injunction; see the cases collected in the note to 2 *Desaus. Eq.* 437, and also the case of *Jerome vs. Ross*, 7 *John. C. R.* 315.

The next inquiry is, is it the established chancery doctrine in *Maryland* to restrain the repetition of a mere trespass, pending proceedings at law to try the right? For such a departure from a well settled principle of equity, as much a

part of the chancery jurisprudence of *Maryland* as of *England*, no satisfactory reason can be assigned. The early cases decided in the chancery court of *Maryland*, which have been regarded as warranting an injunction in all cases of trespass, pending litigation at law, do not establish the doctrine attempted to be deduced from them. They are either cases where *fraud* in regard to title is the ground of controversy in the chancery court; and where, in the language of the chancellor of *New York*, in *Apthorpe vs. Comstock*, 1 *Hopkins*, 148, the court in which equitable relief is sought, and which alone can give that relief, takes the whole controversy under its own control, and prevents any litigation, excepting that which itself directs, as conducive to its own decision: or they are cases in which the complainant's title being purely equitable, he could maintain no action at law, and was remediless, but for the interposition of a court of equity. Such are the cases of the *Attorney-General vs. Norwood*, and *Cole vs. Garretson*, cited in 1 *Bland's Chan.* 581, or they are cases, in which it may be supposed, consistently with the facts stated, that the chancellor regarded the mischiefs resulting from the trespasses threatened, as irreparable. If then acting under a misconception of the early cases referred to, the modern doctrine contended for has been, as is asserted, introduced into the chancery court of Maryland, it has never received the sanction of the appellate tribunals of the state, and will not be sustained by this court. The powers of the court of chancery are sufficiently comprehensive and extended, when in cases of mere trespass, their preventive interference, by injunction, is restricted to cases of irreparable mischief; to the prevention of a multiplicity of suits; or to cases where peculiar circumstances imperatively demand the interposition of such a conservative remedy.

We fully concur in the views expressed by *Chancellor Kent*, upon this subject, in *Jerome and others vs. Ross*, 7 *John. C. R.* 315, "that an injunction is not granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of per-

fect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. It must be a strong case of trespass, going to the destruction of the inheritance, or the mischief is remediless to entitle the party to the interference by injunction;" and of *Judge Story*, who, in his commentaries on equity jurisprudence, 2 *vol.* 207, states, "that courts of equity interfere in cases of trespass, that is to say, to prevent irreparable mischiefs, or to suppress multiplicity of suits, and oppressive litigation."

Assuming then the existence of that analogy, (as respects the issuing of injunctions) between obstructions to rights of way, and trespasses, no benefit will result to appellee before this court in attempting to invoke to his aid this modern doctrine of the chancery court of *Maryland*, ought the injunction to have issued or been continued on the ground of irreparable mischief, is the next inquiry? It is true the appellee in his bill alleges, that by the obstruction complained of, "great and irremediable damage will accrue to him, his mills aforesaid being thus wholly cut off from their ancient and accustomed outlet:" but the reasons are not given, the facts not stated, which shew to the court that this great and irremediable damage would result by the continuance of the obstruction, until the right of the appellee should be established at law. It is not charged that he has no other reasonably convenient outlet from his mills, that by this obstruction a valuable portion of the customers of his mills will be driven from them. The mere allegation of a complainant, that irremediable damage or irreparable mischief will ensue, is not sufficient. To satisfy the conscience of the court, the facts must be stated, to shew that the apprehension of injury is well founded. Without such a statement of facts, no injunction should have issued. And the defect in the bill, if such a remedy were applicable to such a case, is not cured by the testimony taken in the cause. So far from its exhibiting a case where the continuance of the outrage complained of would work great and irremediable damage, it shews one which warrants the inference, that the loss or injury

resulting would be trivial, and susceptible of adequate compensation in damages at law. But if it were otherwise, the default of the appellee in standing by and permitting the appellant, *Amelung*, to enclose the land affected by the way in question, and to cultivate and improve the same for four years, would interpose a strong, if not an insuperable barrier to any interference in his behalf by way of preliminary injunction.

Believing that county court erred, both in the order granting, and in the order refusing to dissolve the injunction, this court will sign a decree reversing both those orders with costs in this court.

ORDER REVERSED WITH COSTS.

RICHTER AND WHEAT *vs.* PUE AND WIFE.—*June*, 1838.

Under the acts of 1835, ch. 346 and 380, an appeal will not lie from an order granting, or from the refusal to dissolve an injunction, until the defendant has filed his answer; and when an answer has been ruled insufficient upon exceptions, it is regarded as no answer.

APPEAL from *Chancery*.

THIS was an appeal under the acts of 1835, ch. 346 and 380, from an order granting, and from an order refusing to dissolve an injunction, issued against the appellants upon the bill of the appellees. The chancellor, in his order of the 2d May, 1838, refusing to dissolve the injunction, had sustained certain exceptions of the complainants to the answers of the appellants, and ordered them to make and file a good and sufficient answer to the bill of complaint, on or before the 20th June, 1838. The appeal was taken on the 4th June, 1838.

At this term, ALEXANDER for the appellee, moved to dismiss this appeal, upon the ground that under the acts of 1835,

no appeal will lie until after answer by the defendants. The right was given on condition of "the answer of the defendant or defendants being first filed,"—and he contended that an answer ruled insufficient upon exceptions, was, according to the practice of the court of chancery, *as no answer.*

MAYER, contra.

By the Court: APPEAL DISMISSED.

WILLIAM CATON *vs.* ROBERT CARTER.—*June*, 1838.

The orphans courts have no jurisdiction to decide upon controversies between master and apprentice.

The particular order in which a party chooses to establish the facts of his case, is a matter for his exclusive consideration.

APPEAL from the *Orphans* court of *Anne Arundel* county.

THIS was a petition for freedom, filed on the 12th December, 1837, by the appellee, claiming to be born free, and alleging he was held as a slave by the appellant. The defendant below, *Caton*, claimed the petitioner as his apprentice, for a period not yet expired, and denied the jurisdiction of the court.

The petitioner, at the trial before the orphans court, offered proof that he was the son of a free woman; that he was lawfully bound to Mrs. Anne Kearney by indenture of the 2d September, 1834, approved by the justices, and recorded in the records of Anne Arundel county court, that his name was Robert Carter, and that upon the death of his said mistress, whom he served several years, her representatives abandoned all claim to him. That the mother of the appellee is dead, and her and his next of kin were now in court, soliciting that he should be bound again.

It was admitted by counsel, that one *Marcellus Carter* was duly bound as an apprentice to *John Stalker* by the name of *Marcellus Kean*, by indenture produced in court, bearing date

25th July, 1833; and that on the 17th July, 1834, one *Marcellus Carter* was bound as an apprentice to *William Caton.*

The defendant, *Caton*, then offered to prove that the petitioner was the identical boy bound by the indenture of 17th July, 1834, to him, by the name of *Marcellus Carter*, and that the said boy had been for several years in the custody of the defendant under said indenture, and asked the court to reduce the testimony of the witnesses to writing, but the court, on objection made by the petitioner thereto, were of opinion that such evidence was not admissible, and refused to reduce the testimony to writing.

The orphans court therefore decided, that since the death of *Mrs. Kearney*, and the non-claim of her representatives to the petitioner, he was fully under the power and control of the court, as an orphan free boy without mistress or protector; and accordingly, ordered him, with the consent of his nearest relation, to be bound to one *S. E. Duvall.* Whereupon, the said *William Caton* appealed to this court.

The cause was argued before Buchanan, Ch. J., Archer, Dorsey, and Chambers, Judges.

By S. Pinkney and A. C. Magruder, for the appellant,

And Alexander, for the appellee.

Chambers, Judge, delivered the opinion of the court.

The orphans court could have no jurisdiction in this case, if the appellee was the apprentice of the appellant.

It was therefore proper to receive testimony upon this preliminary question.

To establish the fact of such apprenticeship, it was necessary to prove that the appellee had borne the name by which it was alleged he was apprenticed—that indentures had been regularly executed by competent parties, and that they had been regularly approved and recorded. The particular order in which the appellant chose to establish these facts was a

matter for his exclusive consideration—the record shews that he commenced by offering testimony of the identity of the appellee, and we think that the orphans court was wrong in arresting the examination.

JUDGMENT REVERSED AND CASE REMANDED.

APPENDIX.

The Tide Water Canal Company *vs.* Ann Archer.
Harford County Court.—May term, 1839.

It is settled in this state, that the power to take private property for public uses, upon making just compensation, may be exercised for the benefit of the public, by individuals, or by corporations, upon whom the legislature has, within proper limitations, conferred the power so to exercise it.

In construing statutes giving powers, that are to be applied to a great public object, depending for its success upon the judgment of the officers entrusted with its execution, and in whom there must of necessity be vested large discretionary powers, the interpretation should be liberal.

Care should be taken on the one hand, to secure to the individual whose property is appropriated to the public, a just and reasonable compensation; and on the other, that the objects contemplated by the grant of the powers, shall not be defeated, or embarrassed.

A jury summoned under the Act of 1825, ch. 180, to assess the amount of damages sustained by the owners of property, though at liberty to enlighten their own judgments by the testimony of others, are not, as juries in ordinary civil and criminal cases are, bound by the weight of evidence.

They may be governed greatly by the "view" which they take of the lands to be valued by them, when they meet thereon.

In determining questions of fact, in which the verdict of an ordinary jury would never be disturbed, if justified by the weight of the evidence, their decision would be open upon review by the court.

In cases arising under this statute, and other kindred ones, the reviewing tribunal may hear new testimony, as good cause against the inquisition, and set it aside upon such new evidence, though upon the proof submitted to the jury the verdict was right.

The proceedings of a jury empanelled under this law, and others of a like nature, are not to be regarded as those of a common law jury, and the jurors who signed the inquisition, may be examined as witnesses, as to the grounds and motives of their finding; in order to ascertain whether their verdict is not the result of mistake in the facts, as well as the law.

That the sheriff who summoned the jury, may have been partial to, or prejudiced in favour of one of the parties to the controversy, is not *per se* sufficient to set aside the inquisition, if it appears that no injustice has been done to any one.

The objection, that a juror is related to the parties, or interested in the land to be condemned, should be taken by way of challenge, before he is sworn, and comes too late, upon a motion to vacate the inquisition.

In cases of inquisition, to condemn property under this law, and others of a like nature, all the papers returned by the sheriff are to be regarded as one whole, each constituting a part of the other, and to be construed together, as a record of the proceedings.

The inquisition itself, need not assert upon its face, that the sheriff administered an oath to every juryman.

It is sufficient if the fact appears by his return, and the very language of the oath prescribed by the statute need not be followed, if the substance is preserved.

If other persons, beside the particular proprietor in the case, have an interest in the land condemned, it is not a valid objection, that such interests do not appear upon the face of the inquisition.

Where an appeal is allowed by law from the finding of the jury, and upon such appeal, the case is to be tried *de novo*, as if no finding had taken place, it is not *laches* in either party, that he offered no evidence, or forbore to offer all his evidence upon the first trial,—and if the law granting the appeal is repealed before the appeal is heard, that does not deprive the party in shewing cause against the inquisition, in the original court of the privilege of offering the proof, which he omitted before, relying upon his right of appeal.

It is not necessary that the jury in their inquisition, should describe the lands by metes and bounds.—If the description is such as to enable the party to make a true location, it is sufficient; and as in cases of deeds of conveyance, and inquisitions in the nature of *ad quod damnum;* matters in *pais*, may be resorted to, to arrive at the true location.

But where the first line of a parcel of land was described, as "beginning at the lands of H. S. and running thence down the Canal, and parallel thereto," and no natural boundary, plat or diagram was referred to, as designating the spot, at which the starting point on the lands of H. S. was situated, the description was held insufficient, and incurable by a resort to extrinsic circumstances.

The court in a proceeding of this kind, has no jurisdiction to correct the description, except by consent of parties.—Nor would the tender of a deed by the land proprietor, correcting the description, but refused by the other party, vary the case; and it *seems* that either party, may take advantage of the defect.

If the party in possession of the land have but a life estate, and the jury condemn it in perpetuity, and allow damages as for a fee simple, the whole estate is bound by the inquisition, though notice is only given to the party in possession, the owner for life, and the proprietor of the fee may get his proportion of the damages by applying to chancery for a distribution.

The rule by which damages are to be estimated, is in all cases a question of law, though the application of it is for the jury.

In estimating the value of property condemned for the public use, the jury should give the proprietor what, in their judgment, it would actually *at*

the time, sell for, and not what it might bring, or perhaps ought to produce, at some future period.

Possible or probable profits resulting from the enjoyment of the property, are not proper to be considered by the jury in making up their verdict; but they should limit themselves to the direct loss sustained by the owner, or other persons having an interest in the property sought to be condemned.

THIS case was argued at this term, before MAGRUDER and PURVIANCE, Judges.

By WM. SCHLEY and OTHO SCOTT, for the *Company*, and MCMAHON and R. JOHNSON, for *Mrs. Archer*.

The nature and circumstances of the case are fully stated by the learned judges, before whom it was tried and decided.

THE questions now to be decided in this case, arise upon objections filed by the *Tide Water Canal Company*, to the affirmance of the inquisition returned to the clerk of this court by the late John Carsins, who was at the time of the taking and of the return thereof, the sheriff of Harford county, and the same having been taken on parcels of land alleged and stated in and by said inquisition, to be owned and claimed by *Mrs. Ann Archer* of said county. The objections are filed under a provision in the 13th section of the act of assembly of 1825, chapter 180, entitled "an act for the promotion of internal improvement," which section was ingrafted by the fourth section of the act of 1825, chapter 200, upon the charter of a company formerly called the "Susquehanna and Patapsco Canal Company," whose corporate name was changed by the third section of the act of 1835, chapter 340, and first section of 1835, chap. 356, by which enactments the company thereafter became, and was known and designated by the name and style of "*The Tide Water Canal Company.*" The 13th section of the act of 1825, chap. 180, after prescribing the manner in which the inquisition is to be taken, directs it when taken, to be returned by the sheriff to the clerk of his county, and then goes on to provide that "*unless good cause be shewn against the said inquisition*, it shall be affirmed by the court and re-

corded; but if the said inquisition should be set aside, the said court may direct another inquisition to be taken in the manner above prescribed," &c. &c. It is under this provision that the *Canal Company* has offered its objections, and has alleged as cause why the inquisition should be set aside, not only that the damages allowed are excessive, but that there are many and various other grounds, all of which are set forth distinctly, and any of which, if sustained by the court, ought, as it is contended by the counsel of the company, to prevent the affirmance of the inquisition. It has not, heretofore, been the practice of the court, in cases arising under the acts of assembly authorizing the condemnation of private property for public purposes, to assign at length, their reasons for their decision. It has been their usual course, simply to affirm, or to set aside, as in the exercise of a sound discretion, it seemed best to them, the inquisition taken and returned to the court; but as the case now under consideration, is one involving a large amount of money—affecting in its principles, many other cases now depending and awaiting its decision, and which it is most probable, cannot be finally settled until there is an adjudication upon the many questions which have been presented by the argument, to the consideration of the court—as it is one of a class of cases, in relation to which there have been several legislative enactments, and as moreover, it has been ably argued by the counsel of both parties respectively, it is, perhaps expected, but is, at any rate, fit and proper that reasons should be assigned for the decision now about to be made.

As most, if not all, of the objections set up by the *Canal Company* are founded upon the provisions of the 13th section of the act of 1825, chapter 180, and as much of the validity of those objections will depend upon the true construction of that section, it may be well, before we proceed to an examination of the several questions, to make a very few remarks upon the policy of that statute, and the object and intention of the legislature in passing it. The power of appropriating to public uses the property of any individual,

whenever the public exigencies require it, on the equitable and indispensable condition that such individual shall receive just compensation for his property so taken, has been heretofore decided in this case, in one of its earlier stages, to exist in the state, and has been conceded, in the argument, by all the counsel. This power, or as it is termed by the books, the right of "eminent domain" is inherent in every government. It has been settled in the judicial tribunals of every state in which the right to its exercise has come under review, to be a legitimate assertion of power by the legislature, in all cases in which they do not stop short of providing for compensation. And it is equally well settled now, and in this state certainly, that this right may be exercised for the benefit of the public by individuals, or by corporations, upon whom the legislature has, within proper limitations, conferred the power so to exercise it.

The "act for the promotion of internal improvement," (1825, chap. 180) was almost the commencement of those great undertakings, which in the language of one of our statutes (1824, chap. 79) was "to establish a connected navigation between the eastern and western states, so as to extend and multiply the means and facilities of internal commerce and personal intercourse between the two great sections of the United States, and to interweave more closely all the mutual interests and affections that are calculated to consolidate and perpetuate the vital principles of union." The legislature had previously created a board of public works, and had, in other respects, manifested a determination to prosecute with vigour, that great system of internal improvement which was to advance the prosperity and elevate the character of the state, and this act (1825, chap. 180) was a portion of the legislation which was necessary to carry out that system. In interpreting statutes which confer powers that are to be applied to a great public object, depending for its successful results upon decision of character and maturity of judgment in the officers and others entrusted with its execution, and in whom, from the very nature of the case, there

must necessarily be vested large powers, resting much for their exercise in discretion, and that discretion undefined, our construction ought to be benign and liberal—whilst on the one hand, we should regard these statutes as remedial acts, intended to carry into execution that most important and equitable provision in favour of private right, that whenever public necessity demands that the property of any individual should be appropriated to public uses, he shall receive a just and reasonable compensation therefor, and give to the expressions of the lawgiver the sense most suitable to the subject and best adapted to ensure to such individual the most liberal compensation for the damages he may sustain, we are, on the other hand, so to construe them as not only not to embarrass or defeat their purposes, but as far as we properly can, to facilitate and promote the success of a great and generous scheme of public policy. We are not to regard as wrong-doers or trespassers, those who in the execution of the work of public improvement, must necessarily come in conflict with private right, provided they act with good faith, and with sound common sense. Private rights of every description must give way upon such an occasion, to the permanent interest of the public, upon fair and reasonable compensation, otherwise it would be impossible to accomplish any scheme of internal improvement of any magnitude, involving heavy expense. The legislature having, in such cases, provided for the payment of compensation to the owner of private property whose individual rights have been impaired, whenever that is paid to the claimant of damages, the state succeeds to his right. The state becomes a purchaser; and the sole reason why the purchase is not one in fact and made in the ordinary way is, that the parties cannot agree upon a sale, for it is only "in case of disagreement," where there is a legal capacity to contract that the power to condemn by process of law, the lands wanted for public uses, is conferred by the state upon those whom it has constituted its representatives in carrying out the scheme of public policy.

With these principles or rules of interpretation for our

guidance, let us now consider the various objections which have been interposed by the *Canal Company*, as causes why the inquisition returned by the sheriff, in this case, ought not to be confirmed. The particular section under which the several questions growing out of these objections, arise (sec. 13 of 1825, chapter 180) is in the following words, viz: "And be it enacted, that it shall and may be lawful for the president and directors, or a majority of them, to agree with the owners of any land through or on which it is intended that the said canal or any of the works thereunto appertaining shall pass or be situated, for the purchase or use and occupation thereof, and in case of disagreement, or in case the owner thereof shall be a *feme covert*, under age, *non-compos*, or out of the state or county, on application to a justice of the peace of the county in which such land shall be, the said justice of the peace shall issue his warrant under his hand and seal, to the sheriff of the county, to summon a jury of eighteen inhabitants of his county, not related to the parties, nor in any manner interested, to meet on the land to be valued, at a day to be expressed in the warrant, not less than ten, nor more than twenty days thereafter; and the sheriff, upon receiving the said warrant, shall forthwith summon the said jury; and when met, shall administer an oath or affirmation to every juryman who shall appear, being not less than twelve in number, that he will faithfully, justly and impartially, value the land and all damages the owner thereof shall sustain by cutting the canal through such land, or the use or occupation for the purposes and period necessary, of such land, according to the best of his skill and judgment, and that in such valuation he will not spare any person for favour or affection, nor any person grieve for malice, hatred or ill-will; and in every such valuation and assessment of damages the jury shall be, and they are hereby instructed to consider, in determining and fixing the amount thereof, the actual benefit which will accrue to the owner from conducting the said canal through, or erecting any of the said works upon his land, and to regulate their verdict thereby, except

that no assessment shall require any such owner to pay or contribute any thing to the said company, where such benefit shall exceed in the estimate of the jury, the value and damages ascertained as aforesaid; and the inquisition thereupon taken, shall be signed by the sheriff and some twelve or more of the jury, and returned by the sheriff to the clerk of his county, and unless good cause be shewn against the said inquisition, it shall be affirmed by the court and recorded; but if the said inquisition should be set aside, or if, from any cause, no inquisition shall be returned to such court within a reasonable time, the said court may, at its discretion, as often as may be necessary, direct another inquisition to be taken in the manner above prescribed, and upon every such valuation, the jury is hereby directed to describe and ascertain the bounds of the land by them valued, and the quantity and duration of the interest and estate in the same, required by the said company for its use, and their valuation shall be conclusive upon all persons, and shall be paid by the said president and directors to the owner of the land or his legal representatives, and on payment thereof, the said company shall be seized of such land, as an absolute estate in perpetuity, or with such less quantity and duration of interest in the same, or subject to such partial or temporary use or occupation, as shall be required and described as aforesaid, as if conveyed by the owner of them," &c. &c.

The first objection which we shall consider is that which charges the late sheriff who returned this inquisition, with partiality to the proprietors of the lands taken under it, and with prejudice against the *Canal Company*, and with having acted in this behalf, under the influence of those feelings " in this, to wit: that he summoned particular persons to attend as jurors in this case, from his knowledge or belief, that said persons, as jurors, would be in favour of awarding high damages; and purposely omitted to summon certain other persons, as jurors, from his knowledge or belief that said omitted persons, if summoned and sworn as jurors, would not be in favour of awarding high damages; and also in

this, to wit: that at the time of summoning the jurors in this case, or some one or more of them, he openly advocated the giving of high damages to the proprietors by juries, and spoke in terms of reproach and disparagement of certain individuals, who had served on former juries, because such individuals had refused to sign some inquisition or inquisitions on the ground that the damages allowed, were, in their judgment, high and excessive; and also in this, to wit: that on the day this inquisition was taken, and before the same was found, he urged upon the jury, or some one or more of them, that high and liberal damages ought to be given to the proprietors of lands, taken for the use of said company." Connected with this objection are several other additional ones, five in number, which charges the sheriff with corruption, as well as with prejudice and partiality, and which set out in detail the facts upon which the charges rest, and which facts are substantially embraced in the objection herein above recited. In coming to the conclusion at which we have arrived on this point, it became necessary to consider and decide another question which was argued, and that was, whether the testimony of the jurors who found this inquisition, could be taken before the court on the whole subject of this review, or if not, then to what extent it could be received. We do not intend to question, in the slightest degree, the authority of the case decided by the chief judge of this court, referred to in the argument, and which will be found reported in a note to the case of *Bosley vs. The Chesapeake Insurance Company*, 3 *Gill & Johns.* 473. On the contrary, we think that decision, which was pronounced after a careful examination of the books, entitled to the same respect in which it is held by the profession, and which it has deservedly received from the reporters of the highest court in this state. And the reasoning with which the learned judge sustains his opinion, is strong and founded upon sound sense, independent of the cases referred to by him as having been adjudicated by other tribunals. He says that those decisions establish the principle "that no evidence can be received from

the jury to show mistake," and thinks "those decisions right, because were the law different, an inquisition might be instituted in every case, into the grounds and motives of a jury for their finding, in order to ascertain whether in coming to given conclusions, they had not mistaken facts. Verdicts of juries would then, in all cases, be uncertain. To permit such inquisitions into the motives of juries, would it appears to me," continues the judge, "be against public policy, and lead more frequently to the prostration of justice than to its preservation." The courts in England have also refused to receive the affidavits of jurors to explain the grounds of their verdict, and show that they intended something different from what they found. But the case in the note to 3 *Gill & Johns.* 473, just referred to, and it is believed also all the other cases in which the doctrine has been established which excludes the testimony of jurors, were instances of a common law jury, whose verdict is entitled to peculiar sanctity, and the rule rejecting the affidavits of jurors composing a panel of that species of jury, to impeach their verdict is strict, and rarely, if ever, departed from. *(Canal Bank of Albany vs. Mayor, &c. of Albany*, 9 *Wendell*, 254, *& cases ib. cit.)* There is one case, however, which was tried before a common law jury, wherein, after a careful review by the supreme court of New York, of all the authorities, the affidavits of two of the jurors were received, on a motion for a new trial, to show that in making up their verdict, they adopted a principle, in estimating damages, not allowed by law, (5 *Cowen*, 106, 121, *Sargent vs.* —— ——.) And the court there say that the affidavits may be received in the case before them, without impeaching the principle of either class of those cases which had passed under their review. It is true that in this last case, it is stated that the counsel for the plaintiff, in summing up, told the jury that they must find according to a principle which was afterwards, on hearing the motion for a new trial, disapproved by the court, and which not being corrected by the judge who presided at the trial below in his charge after the counsel had summed up, led the jury astray, and they in

consequence allowed in their verdict what was claimed upon an erroneous principle of law. The court say, "this is in effect, equivalent to a misdirection of the judges. It is clearly the duty of the court to interfere in such a case, if the facts come properly before them." So that even a common law jury may be allowed to testify as to their having, in making up their verdict, estimated the damages upon a principle erroneous in point of law. This decision may have some bearing upon another question in this case, hereafter to be considered.

In the view which we take of the nature, duties, and powers of the jury which is constituted by the 13th section of the act of 1825, chapter 180, we shall not, in any wise, disturb the rule which has been adopted by the decisions above adverted to. It seems to us that the legislature did not intend to throw around that jury all the attributes and rights of a common law jury, nor to confine it to the duties and limitations to which a common law jury is subjected. In performing the duties prescribed to him by the provisions of that section, the juryman is not to govern himself "according to the evidence" adduced in the cause, as a juror in ordinary cases, is sworn to do, but he is to act "according to the best of his skill and judgment." We do not mean to say, that in cases of this kind, the jury are prohibited from listening to testimony, because the practice in this state has been to do so, and the opinion of the chief justice of the supreme judicial court of Massachusetts pronounced in a case arising under a statute conferring upon a jury a similar power to *estimate upon view*, would seem fully to sustain that practice, (*Parks vs. Boston*, 15 *Pick.* 210,) Mr. Chief Justice *Shaw*, in delivering the opinion of the court in that case, says, "the locating committee, and the sheriff's jury, are to make an estimation upon view, and speaking for myself, I cannot," says the Judge, "perceive why they might not, in both cases, have estimated the damages upon their own experience and judgment, without any evidence *aliunde*, though they might be at liberty to enlighten their own judgments by the

aid of testimony." We only mean to say, that we think such a jury is not bound, as juries in ordinary civil and criminal cases are, by the weight of evidence—they may be governed greatly by the "*view*" which they take of the lands to be valued by them when they meet thereon, as they are not instructed upon questions of law, by a court, they may and probably often, and generally do, form and act upon their own opinions, or those of their presiding officer, as to the law, arising out of the facts before them, and in so far as they are correct in these opinions, their proceedings would be free from error; but still they are liable to err upon such points, not having, as jurors in ordinary trials always have, the aid of a court, which is peculiarly conversant with such subjects. It would occupy too much space to enter into details to show the difference which exists between a body of men proceeding under a law of this kind, and a common law jury—they are, it is true, authorized to examine, consider and settle, so far as they constitute a part of that entire tribunal which is finally to settle them, great and important interests, and rights of property; but even in determining questions of fact, in which the decision of an ordinary jury would never be disturbed, provided it was justified by the weight of evidence, the verdict of a jury empannelled under the provisions of the statute we have been considering, would not be conclusive, although it might be found according to the weight of evidence, but would be, even on that point, open upon review by the court. Such has been the practice in this state, it is believed, and it would seem to be sustained by the phraseology of the statute itself, because although in cases of ordinary trials in courts, it might conflict with well established rules to set aside upon testimony not produced at the trial a verdict right in itself upon the evidence which was submitted to the jury who rendered it, yet in cases arising under this statute and other kindred ones, the introduction of new testimony to enlighten the judgment of the reviewing tribunal, and which, if it had been heard by the jury who found the inquisition, might have led their minds to a different result,

would, if such testimony should materially alter the state of the controversy and the rights of the parties, be "good cause shewn against the said inquisition," and why it should not be affirmed by the court. We refer to a case already cited in this opinion, (*Canal Bank of Albany vs. Mayor, &c. of Albany*, 9 *Wend.* 254, *et sequent.*) in which the marked distinction existing, in many respects, between a jury such as is constituted by our canal and rail road laws, and other similar *ad quod damnum* statutes, and a common law jury, is pointed out somewhat at length, and, according to our judgment, very correctly and precisely. There Mr. Justice *Nelson*, in delivering the opinion of the supreme court of New York, in page 255, remarks, "in this case (similar in its character, somewhat, to that we are now considering) there is nothing to characterize the twelve men empannelled as a jury, but the name and mode of selection." In page 254, after stating that he was not now disposed either to vindicate or impugn the rule rejecting the affidavits of jurors to impeach their verdicts, a rule which he admits is strict, and rarely departed from, he says, "there are cases both in our own and the English courts, in which appeals to the sense of justice of the courts, have excluded, if not overcome, the stubbornness of the rule. I admit," he says, "they are few, and do not intend to multiply them. It is enough that *the rule is exclusively applicable to a common law jury*, and is never applied or enforced where a body of men are substituted in their place, as in the case of arbitrations, referees, commissioners, &c. The principle applicable to a common law jury, *never could be endured in those cases*, and the grounds upon which it may be defended when confined to the verdict of the jury, do not exist here." He then gives a sketch of the proceedings of a common law jury—draws the distinction to which we have before alluded, between such a jury and that which is directed by statutes similar in their nature to that under which the jury in this case was empannelled—sets forth "the multiplied means of accurate information both in law and fact," which are accessible, and of

right belong to a common law jury—notices "the guards which have been cautiously and securely thrown around them to prevent extraneous influence or the knowledge of any fact except such as transpired in open court, all affording to the parties great security against error or mistake by the jury, and some foundation in reason for the policy of the rule which can exist in no other proceeding," and concludes in the emphatic language we have before transcribed, that "there is nothing to characterize the twelve men empannelled as a jury, but the name, and mode of selection." We are of the opinion that the proceedings of the jury who were empannelled in this case under the act of assembly, are not to be regarded as those of a common law jury, and therefore that the jurors who signed the inquisition, may be examined as witnesses upon all subjects whatever relating to this controversy, as fully as any other persons who might be sworn as witnesses in the cause—that they may be examined as to the grounds and motives for their finding, in order to ascertain whether in coming to their conclusions, they had not mistaken facts, as well as the law.

It is satisfactory to find that in the judicial district of our state, in which the learned and distinguished chief justice of Maryland resides, it has been decided in several cases, on the trial of objections to inquisitions taken before the sheriff for the condemnation of lands for the purposes of the Chesapeake and Ohio Canal Company, that jurors empannelled on the inquest may be sworn and examined as to the grounds of their inquisition, and may be permitted to give evidence of any facts and circumstances within their knowledge pertinent to the question under consideration, which others would be competent to prove. This constant and uniform practice of the judges of that district, who have had more experience upon such subjects, by reason of the many condemnations which have taken place at the instance of the Chesapeake and Ohio Canal Company, than has fallen to the lot of the members of any other judicial district in this state, would, of itself, and independent of the respect which is so justly due

to the members of that learned tribunal, be regarded as adding great weight to the authorities which have been referred to, in support of the opinion which we have expressed.

We approach next, the question as to the conduct of the sheriff, but before we consider that, it will be necessary to dispose of a preliminary objection which was interposed in the course of the argument, by the counsel for the land proprietor. It was contended that this objection, if it was known to the counsel of the *Canal Company* at the time that the jury met upon the land, and it is asserted that it was within their knowledge, ought to have been taken before the jury was sworn, and in support of this position the case of *Barre Turnpike Corporation vs. Appleton*, 2 *Pick.* 430, has been relied on. There, however, it was expressly provided by the statute under which the proceeding took place, that the jury to be empannelled should be summoned by the *sheriff* or his deputy, or if he, or either of his deputies, were a party, or interested, that the jury should be summoned by a coroner of the county. The court in that case (page 433) put their decision upon this provision in the statute, saying that "the proceedings in the case are strictly and exclusively regulated by statute, and it is not for us to question the propriety of any of the provisions upon the subject." There is no such provision in the act of assembly now under consideration, but on the contrary, no power is given to any person in that behalf but the sheriff, to whom alone is confided the duty of summoning the jury, and without some further legislative action, no one else could exercise such an authority. It would not be difficult to show that, however proper it might be under the Massachusetts statute to require such an objection to be made *in limine*, and before the empannelling of the jury (and we concede the correctness of the decision just referred to) such a course ought not to be exacted under the statute of Maryland, and we entertain no doubt, that if upon a review of the proceedings before this court, such a case of partiality or of prejudice, and *a fortiori* of corruption in the sheriff could be shewn, as would render it necessary for the

advancement of justice that the court should interpose, it would not now be too late for either of the parties, if their rights were affected by the misconduct of that officer, to claim such interposition. It would be, as we think, clearly "good cause against the said inquisition," within the fair intent and meaning of that provision of the statute which confers upon this court the authority to affirm or set aside the inquisition. But in the view which we take of this branch of the inquiry, it will be unnecessary to enlarge upon the subject further than to say, that this is an application to our discretion, and it must be treated as all applications of a similar character are now treated, according to the settled practice of the courts. On motions for new trials, not only in civil but in criminal cases, and some of them were capital, where jurors have been improperly put into the jury box, and have formed a portion of the panel which gave the verdict, the courts have refused to set aside such verdict, where there was no proof of any fraud on the part of the summoning officer, nor of collusion with any other person; and the reason is, that no injustice has been done to any body, that being the true subject of inquiry in all such cases. That a sheriff, or any other officer concerned in the administration of justice, should not only act with integrity, but should also be free from all partiality or prejudice, and wholly indifferent, is certainly demanded of him by the law, because if he were not so, great mischief might follow, and much injustice be done. But where it is clear to the courts that there is no ground to apprehend any such result as injustice to any party the reason of the law ceases. The courts endeavour always so to apply the law, as to effectuate justice. The case of *The King vs. Hunt, in* 4 *Barnw. & Ald.* 430, *S. C.* 6 *Sergt. & Lowb.* 476, states the true rule. Mr. Justice *Best*, there says, "taking it to be an application to our discretion, is it shewn that any injustice has been done? The true rule is this, if the officer has not done his duty, he is to be punished for it; and if his omission has actually produced prejudice to the party, then it is in the discretion of the court *to prevent injustice* being done,

by granting a new trial." In the case now under consideration, the proof is abundant, that even had the sheriff been partial, and prejudiced, or corrupt, no injury has in fact resulted therefrom to the *Canal Company*, every member of the jury who signed the inquisition, it is believed, has testified that he was never approached directly or indirectly by the sheriff, nor had any conversation with him upon the subject, and that his verdict was rendered free from any influence of that officer. If the sheriff had been guilty of any of the charges brought against him, he would, as we think, have been clearly liable to indictment, and if the proof taken before the court had not shewn conclusively to our minds, that not the slightest prejudice had resulted to any party by reason of the jury having been summoned and empannelled by him, we should not have felt ourselves at liberty, at least in this aspect of the case, to have concurred in an affirmance of the inquisition. It is much to be regretted that a man, who, from the proof in this cause, was one of undoubted integrity, enjoying, at all times antecedent to the period of this alleged offence, an unusual share of the confidence of his fellow-citizens, and whose character had been theretofore free from reproach, should, from any cause, whether at unguarded moments, or when probably under undue excitement, have so expressed himself, as to have subjected his official conduct to so strict a scrutiny, and in the course of a judicial proceeding. It was painful to the court, during the investigation, and it is almost equally so to be constrained now to advert to it, as we have, from a sense of duty, briefly done. It is impossible that justice can be well administered, however pure its fountains, if its officers, and especially one of such confidential trust as a sheriff, be not incorruptible; and no tribunal can properly be silent, however sensibly it may feel the duty of noticing it, when there is the slightest apparent ground for suspicion, and the same is brought to its judicial consideration. It is, however, no more than an act of justice to the memory of the officer whose conduct has been impeached before us, to say, that however indiscreet he may

have been in his expressions on some occasions, and whatever was, at the time of uttering them, the state of his feelings towards the parties to this cause inferrible from the language used by him, as proved by some of the witnesses, we feel bound from the whole evidence, to say that although his language was, at times censurable, we see nothing criminal in acts or intention, and we acquit him of all corruption, and of any reprehensible partiality or prejudice which influenced his official conduct in this case—and we are entirely satisfied, that on this score, no injustice has been done in the finding of the inquisition.

The next objection made, is to the competency of the jurors, in many respects; that some one or more of them had formed and expressed an opinion upon the merits of this case before the jury was empannelled—that several of them were incompetent by law to act in this case, being related within the limited degrees of consanguinity or affinity to the proprietors of other lands required for the use of the *Canal Company*, lying in Harford county, and thereafter to be valued, in which the same question or some of the same questions would arise, and would be considered and determined in making the valuation and assessment of damages in those cases, as arose, and as were to be, and were considered and determined by the jury in this case—and that several jurors who are named in the objection, and who were summoned by the sheriff to attend on the lands to be valued in this case, were, or some one of them was, related to the said *Mrs. Ann Archer*, within the limited degrees, and so incompetent persons to serve as jurors in the case; and so the sheriff did not, as by the warrant to him issued he was commanded, summon a jury of eighteen inhabitants of his county not related to the parties, nor in any manner interested, to meet on the land to be valued. We have said, in a former part of this opinion, that in the interpretation of statutes which confer powers that are to be applied to a great public object, courts ought so to construe them, as not only not to embarrass or defeat their purposes, but as far as they properly can, to facilitate, and

promote the success of a great public undertaking. Now it is true that the statute we are considering, confers special powers and upon a new jurisdiction, and falls within a well established principle of law, that it must, in that behalf, be construed strictly—that these powers must be exercised according to the course prescribed by the statute. We do not think that we at all conflict with this principle, in over-ruling this objection, made, as it is, at this late stage of the proceedings. We are clearly of opinion, that should such an objection be sustained, if there would not be a failure of justice, there would be so many difficulties and embarrassments growing out of it, as would nearly, if not altogether defeat the purposes of the act of assembly. By the provision of the statute, there is ample time allowed from the date of the warrant to the sheriff, who is directed *forthwith* to summon the jury, to every person having an interest in the controversy, to inform himself as to the requisite qualifications of all who are summoned as jurors, and there is no just reason, as we conceive, why a party should not avail himself of such objection, by way of challenge before a juror is sworn, as he would undoubtedly be obliged to do, in the case of a common law jury. The object of this provision of the statute is the same as the law requires in relation to a common law jury, that is to say, that the jurors shall be perfectly disinterested, impartial and free from all exception, and the rules which have been adopted as to challenges, ought, therefore, to be applicable to all juries. That it is the policy of our statutes regulating the qualifications of jurors (1715, *chap.* 37, *and* 1798, *chap.* 21, *sec.* 2) to require an objection to a juror to be made by challenge before he is sworn, is evident we think, upon their face, and that it can only be taken in that mode, is settled by a series of adjudications in England and elsewhere. (11 *East.* 231, *note*, "*the case of a Juryman*," *sometimes called* 12 *East. Rex vs. Tremain*, 16 *Sergt. & Lowb.* 319. 7 *Cowan*, 478. 9 *Johns.* 261. 6 *Wend.* 389.) It is the duty of the parties interested, to make diligent inquiry as to the qualifications of jurors, if they mean to except to their

competency, and they have the right to examine, on his *voire dire*, the juryman excepted to, or otherwise to satisfy the sheriff that such person is not properly qualified. (15 *Johns.* 179, *Merserau vs. Norton.* 6 *Wend.* 389, *The People vs. Jewett.* 11 *Pick.* 274, *Merrill vs. Inhabitants of Berkshire.* 9 *Wend.* 231, *Roach vs. Cosine.*) In one of these cases, the jury was sworn by the sheriff out of court, to assess damages where there had been judgment by default, (15 *Johns.* 179) and the court said, that if there be a legal and valid objection to a juror, "the sheriff may set aside the juror against whom the objection is made, and summon another, *or if he should refuse to do so, it would be ground for an application to set aside the inquisition.*" In another, (11 *Pick.* 274,) which was a proceeding under statutes authorizing the condemnation of lands for a highway, and, of course, similar, in some respects, to the case now before us, the supreme court of Massachusetts say, "it is the duty of the officer (sheriff) not only to summon the jury, but to preside at the trial, *to decide upon challenges and excuses of jurors*, and to determine the competency of witnesses, the admissibility of evidence, and other incidental questions arising in the course of the trial." And in another (9 *Wend.* 228, 231, *Roach vs. Cosine*) where there was a proceeding under a statute regulating *summary proceedings* to recover the possession of land, and where the justice who issued a *venire* for the summoning of a jury, issued a second *venire* because of a sufficient number of jurors not appearing at the return thereof, although it was objected by one of the parties that he had no authority to do so, and where he subsequently, there still being a default of jurors, issued a third and fourth *venire*, on the return of which, the jurors appearing, they were empannelled, the supreme court of New York say, (*page* 231,) "the officer must necessarily have the power of renewing the *venire* until a jury appears, otherwise there would be a failure of justice. It is a power incident to that of conducting an inquiry by means of a jury." So that, in this respect, the law is the same as to all juries, the reason of the law being, in all such cases, the same. We

entertain no doubt that all these objections to the jury which was empannelled in this case, come too late; not having been taken by way of challenge, they cannot now be allowed, and ought to be over-ruled. In support of this opinion, see the following cases: *Ramadge vs. Ryan*, 9 *Bingh.* 333. *S. C.* 23 *Serg. & Lowb.* 296. *Jefferis vs. Randall*, 14 *Mass.* 205. *Rex vs. Sutton, et al*, 8 *Barnw. & Cross*, 417. *S. C.* 15 *Serg. & Lowb.* 253. *Amherst vs. Hadley*, 1 *Pick.* 38, 43. *Mima Queen and child vs. Hepburn*, 7 *Cranch*, 297. *Hollingsworth vs. Duane*, 4 *Dale.* 353. *Onions vs. Naigh*, 7 *Price's Exchq. Rep.* 203. 7 *Law Lib.* 161. 6 *Greenleaf*, 307, 329, *McClellan & Crofton.* 3 *Greenleaf*, 215, *Walker vs. Green.*

It is further objected, that illegal and improper evidence was given to the jury, on the part of the land proprietor in this case, and which the said company, as it is alleged, had no means or power to prevent, and that the jury were misdirected and misled, in matters of law, by statements and assertions of the counsel of the proprietor and others, as to the rights of said proprietor, and as to the duty of the jury in the premises, and as to the rights, obligations, privileges and franchises of the *Canal Company*, and that these statements and assertions, although erroneous and unfounded, were accredited, believed and acted upon by the jury, or by some of the jurors, and which statements and assertions, the *Canal Company* had no adequate means to countervail or correct before the jury. That unjust and improper means were used, to influence the jury to give high and excessive damages against the *Canal Company*, such as creating the belief and impression that all jurors, who were not in favour of high damages, were unfriendly to the land-owners, and thereby inducing the jury to believe, that if they did not give high damages, the land-owners would regard them as personal enemies; and also creating the belief and impression among the jury, that they would be regarded as illiberal and ungenerous, and be subjected to the odium of their neighbours, if they did not give good damages, and that it was also stated

to the jury that they ought to take care of the people; that a corporation of foreigners were taking their lands against their wishes and consent, and ought to be made to pay for it—and that the jury were urged by persons acting for, and on behalf of the land-holders, to give high damages on the ground that the said corporation had a right to appeal, and would exercise it, and that the jury, in their valuation and assessment of damages, took into consideration as a ground of damage, that the *Canal Company* had, at that time, such right to appeal, and a further right to remove said appeal for trial to Baltimore county court, and acted upon the assumption that said company would exercise those rights, and thereby subject the said proprietor to the grievance and inconvenience of attending upon the courts, and to the loss of time and expense of attending in Baltimore city, in person, and with her witnesses, and to the apprehended large and onerous charges to which, it was surmised, she would be subjected in the retainer and employment of counsel to maintain and vindicate her rights, as well in Baltimore county court, as in the court of Appeals, if the case should eventually be carried thither; and that the jury were told by the counsel of the land-holders, that they had no right to take into consideration, in fixing the amount of damages, any advantages which the canal might be to the land-holder.

In relation to almost all these objections, it is sufficient to say that no evidence having been adduced in support of them, so far as we have any recollection, or as derivable from our notes of the testimony, they fall to the ground, of course. As respects any misdirection in matters of law, or misconception of the jury upon that point, or as to the admission of illegal and improper evidence, it may be fit to advert to that portion of this objection, and we shall do so when the question as to the allowance of excessive damages in this case, comes to be considered in its due order. In relation to all other portions of this objection, we consider them as not tenable, because unsupported by evidence—indeed they were not, as we think, much, if at all relied on, in the argument.

It is further objected that the inquisition does not appear to have been, and in fact is not, *signed* by the said sheriff, before whom it purports to have been taken; whereas, by the express directions of law, as it is contended, the inquisition ought to have been signed by the said sheriff and some twelve or more of the jury. And it is also objected, that in his return of said inquisition to the clerk of Harford county court, it is not set forth or stated, that the said inquisition so taken before him, was signed by him, the said sheriff. These objections are founded upon the well known and admitted principle, that proceedings before a tribunal of limited jurisdiction, or under requisitions particularly described by a statute, must appear on the face of the record of such proceedings, to have been strictly complied with. It is contended that the record does not show the fact of the signing of the inquisition by the sheriff, either upon that instrument itself, or by the return of that officer filed among the proceedings. It cannot be doubted, that this *signing* by the sheriff, if it be such an one as is within the meaning of the law, might have been made, with more accuracy, and it would be well, in all such cases, to avoid difficulty as to matter apparently of form only, but often of substance, by following the precedents set forth in the books. Let us, however, examine, whether in a case of this kind, requiring as it does, all the strictness of construction which would be applied even to the summary proceedings under our attachment laws, the form prescribed by the statute has not been complied with. In *Shivers vs. Wilson*, 5 *Har. & Johns.* 132, which was a proceeding under these laws, and one of a series of cases in the court of Appeals of our own state establishing much rigour in relation to the necessity of adhering strictly to form, the late Chancellor *Johnson*, then a judge of that court, says, in delivering its opinion, "no principle of law is more evident, than that where the tribunal is of a limited jurisdiction, or the proceedings are particularly described by a statute made on the subject, that course of procedure so described, must on the face of the record, appear to have been, if not literally, at least

substantially, complied with." Now in order to determine whether the meaning and object of the statute has been gratified, we must first ascertain what is that meaning, as was done in the case of *Higdon vs. Thomas*, 5 *Har. & Johns.* 139, in which the same court decided that under the fourth and fifth sections of the statute of frauds, (which sections, they say, are, as it respects "signing," substantially the same) a technical authentication by signature, is not necessary, but that if the name of the party appears in the memorandum of a contract, and is applicable to the whole substance of the writing, and is put there by him, or by his authority, it is immaterial in what part of the instrument the name appears, whether at the top, in the middle, or at the bottom, forms not being regarded, provided the statute is satisfied. And in the *State use Williamson vs. Levy*, 3 *Har. & McHen.* 592, where a commission had been issued to take testimony, and the commissioners who signed their names to the return of the commission with the accompanying depositions, had neglected to put their seals, and an objection being taken that it did not appear from the face of any of the proceedings, that the seals of the commissioners were affixed to any part of the commission or its enclosure, the general court held, and the decision was afterwards affirmed by the court of Appeals, that the commission being enclosed in a *cover* directed to the judges of the general court, with the names of the acting commissioners written by themselves on the said cover, and their seals annexed to their names respectively, and having been delivered in a legal and proper manner to one of the clerks of the general court, the testimony taken under it, was properly allowed to go to the jury. It is scarcely necessary to remark, that in cases of this nature, great strictness and accuracy are required, and yet that was held to be a sufficient *sealing* by the commissioners, within the meaning of the mandate of the court which required *the commission* to be returned under their hands and seals, it being *substantially* a sealing.

The object of the statute before us, in requiring the sheriff

to sign the inquisition was, that his name should give authenticity to the whole instrument, because, in directing that it should be signed by him, "and some twelve or more of the jury," it certainly was not intended that his concurrence with them in the finding of the inquisition, was necessary to give it validity. The signatures of the jury who were sworn to assess the damages, made it effectual as to the finding, and the signing and return by the sheriff of the instrument containing that finding, was only necessary to give such authenticity to it as the statute required. If we test the meaning of the word "signed," as applicable to the jurors who found the inquisition, by putting the case of a juryman's name being signed by another person by his authority, in consequence of his being rendered unable to sign the inquisition himself, by reason of some physical disability occurring during the trial, subsequently to his being sworn, and before the rendition of the verdict in which he had concurred, it would be difficult to assert, either in reason, or in the face of decisions in analagous cases, that such was not a signing, within the intent of the law. Besides, no particular day, or time, is prescribed by the statute, at which the jury and the sheriff, are to sign, and although the practice, and a proper one it is certainly, has been, for the jury to sign at the time of the finding, yet the law being silent on the subject, it might be contended, with some show of reason at least, that the signatures might be put on any day before the actual return of the paper, or inquisition, to the clerk of the county. Suppose the sheriff had written upon the inquisition, or paper containing it, immediately under the names of the jurors who signed it, a certificate that it was taken before him, reduced to writing and signed by the jurors in his presence, and had signed his name to such certificate, could it be reasonably said that the sheriff had not "signed" *the Inquisition*?—Suppose he had simply written underneath, or opposite to the names of the jurors, or any where upon the inquisition, the words "taken before, and certified by me, John Carsins, sheriff of Harford county," it would be difficult to contend that such would not be a *signing*

by that officer, within the import of the statute. If he had done no more than to write his name as sheriff on the paper containing the inquisition, that, as it seems to us, would have been sufficient. If this objection be a valid one, then indeed cases might arise, in which inconveniences would ensue that could not have been contemplated by the legislature when they enacted, as it is contended they did, that no inquisition should be valid which was not signed by the sheriff and so returned. Suppose that after all the jurors had signed it, and the sheriff also, that officer had refused to *return* it to the county clerk, would the court in such a case, "direct another inquisition to be taken," because that which was taken, had not been "returned to such court within a reasonable time," or would they not rather compel its return. Or suppose the sheriff, in the case now under consideration, was at this time alive, and willing, or not willing, to sign the inquisition, we think it would be in the power of the court, as they often do in cases of defective returns of property attached by the sheriff under our summary attachment laws, to take in the one case or to compel in the other his signature, *nunc pro tunc*, if that were necessary for the purpose of giving to the inquisition, the authenticity required by the statute. It is only left to state the facts, as they exist in this case, and it must we think be quite clear, that the sheriff has "signed" the inquisition, so far as the law demanded it of him. The sheriff files with the clerk of his county in due time, two papers—the first containing the warrant of the justice who directed him to summon the jury, and his own certificate under his hand and seal as sheriff of his county, that in pursuance of that warrant he had summoned certain persons whose names are set out at length, as eighteen jurors, qualified by law, &c. &c. (in the words of the statute) and that the said jury did reduce their inquisition to writing, and sign and seal the name in due form of law, as by the said inquisition thereto annexed as part of that his return will appear, and concluding with these words, "wherefore I hereby return the said inquisition to the clerk of Harford county court as directed by the act of assembly

in such case made and provided, witness my hand and seal, John Carsins, sheriff of Harford county, [Seal.]"—The other paper filed at the same time, with and constituting part of the first mentioned, purports to be "an inquisition taken, &c. before John Carsins, sheriff of Harford county, on the oaths of," &c. (as in the words of the statute) which is signed and sealed by twelve of the jurors, and under their names and immediately following them, and on the *same paper* containing them and the whole inquisition, is the following concluding sentence, viz: "I do hereby certify and return to the clerk of Harford county court, the aforesaid inquisition taken before me, on the oaths of the jurors above named, as herein set forth and reduced to writing, and signed and sealed by the said jurors in my presence, in conformity to the directions of the act of assembly in such case made and provided, John Carsins, sheriff of Harford county." In the appropriate language of the learned judge who delivered the opinion of the court of Appeals in the case of *Higdon vs. Thomas*, 5 *Har. & Johns.* 155, it would be "a refinement upon subtilty, a total sacrifice of substance to form," were we not to say that in our judgments, "the signature is complete, the objects of the statute have been accomplished," and the inquisition "is available," so far, at least, as concerns this objection.

It is further contended that there is another fatal error in the proceedings before the sheriff, because the inquisition does not appear or purport to have been taken by said sheriff in virtue of a warrant of a justice of the peace of Harford county, to him directed; nor does it appear in and by said inquisition, that the particular jurors, on whose oaths the same imports to have been taken, and by whom the same is signed and sealed, were, or that any one or more of them was or were, parcel of a number of eighteen jurors, inhabitants of said county, summoned by said sheriff to meet on the said land to be valued; nor does it appear, therein or thereby, that the said sheriff summoned a jury of eighteen inhabitants of said county, not related to the parties, nor in any manner interested to meet on the said land to be valued, on the said

day of the taking of the said inquisition, or on any other day.

It is a sufficient answer to say, that there seems to be nothing in the statute, requiring that the inquisition should set forth, contain, or purport, any of those matters; and besides, in the view which we have taken, that all papers returned by the sheriff to the clerk, are to be regarded as one whole, each constituting a part of the other, and to be construed together, as a record of the proceedings, it does appear that all these facts are distinctly set forth upon its face.

Of a like character is the objection that "although it is set forth and stated by the said sheriff in his return of said inquisition, that he instructed the jurors in the valuation and assessment of damages, to consider in determining and fixing the amount thereof, the actual benefit which would accrue to the said owner from conducting the said canal through, or erecting any of said works upon his land, and to regulate their verdict thereby, except that no assessment should require any such owner to pay or contribute any thing to the said company, when such benefit should exceed, in the estimate of the jury, the value and damages ascertained as aforesaid, yet in truth and in fact, the said sheriff did not so instruct the said jury, nor to such or the like effect, as, by law, he was bound to do, and ought to have done.

The evidence offered at the trial, if any such was given, is not sufficient to invalidate the declaration of the sheriff, made upon his official responsibility and oath; and the assertion, in the same solemn manner, of all the jurors, contained in the body of the inquisition to which their signatures are appended, that in fixing the amount of their valuation and assessment of damages, they did consider the actual benefit which would accrue to the landholder, is greatly corroborative of the declaration of the sheriff. There is no positive injunction in the act of assembly, making it the duty of the sheriff particularly, to give this instruction to the jury, the words of the law being that "the jury shall be and *they are hereby instructed* to consider, &c." which would seem to imply that the legislature

meant that the statute itself should be before them during their deliberations, but it is, perhaps, the safer course for that officer to follow the practice which has been introduced, by giving the instruction to the jury.

Objections have also been taken to the form of the oath which was administered to the jury, and to the mode in which it was administered, because, although the inquisition purports to have been taken on the oaths of the jurors therein named, yet it does not appear, nor is it therein stated, that the sheriff administered an oath or affirmation to every juryman who appeared; of such tenor, of such import, or in such terms, as prescribed by the charter of said company; and because it appears on the face of the inquisition, that the sheriff administered to the several jurors, on whose oaths the said inquisition purports to have been taken, an oath or affirmation, in terms, and in substance and form, variant and different from the oath or affirmation prescribed and required by the charter of said company; and further, because in his return of said inquisition to the clerk of Harford county court, the said sheriff certifies and returns, that he administered to the several jurors, on whose oaths said inquisition purports to have been taken, an oath or affirmation, in terms, and in substance and form, variant and different from the oath or affirmation prescribed in the charter of said company.

In relation to the failure of the inquisition to state that the sheriff administered an oath to every juryman who appeared, it does seem to us, that the act of assembly demands it. The return of the sheriff, after setting out the names of the eighteen jurors summoned, states that "the following persons being fourteen of the jurors aforesaid appeared, to wit:" and then inserts their names. This paper, as we said before, is a part of the record of the proceedings, and the fact that he administered an oath to every juryman who appeared, is sufficiently apparent on its face. As regards the form of the oath, which was actually taken by the jury, it is admitted that although the sheriff administered it in the words of the warrant issued by the justice, and as he was thereby commanded

to do, that is to say, that each juror would "justly and impartially value the land," &c. yet as he omitted to add the word "*faithfully*," which is contained in the section of that particular statute, it is an error fatal to the whole proceeding. It would, indeed, be a matter of regret, if even under a law, which it is conceded requires a strict construction, a court was so bound down by authority as to be allowed the exercise of no discretion, and to be obliged to sustain such an objection. But fortunately there are cases adjudicated by the highest authority in our own state, which place law and reason where they ought always to be found, side by side. We have already had occasion to quote the language of that court, in the case of *Shivers vs. Wilson*, 5 *Har. & Johns.* 132, where it was held that it was sufficient, if the course of proceeding directed by law has been *substantially* complied with. In *Thomson vs. Towson*, 1 *Har. & McH.* 507, a proceeding under the attachment laws, and in which the words "*bona fide*" were omitted, the act of assembly requiring that the oath should state that the absconding debtor was "really and *bona fide* indebted," the counsel who argued successfully the motion to quash the attachment, upon the ground of such omission, only contended (page 507) "that the *substance* of *bona fide* must be expressed,"—that "the term *bona fide*, or what is intended by the term, and what it necessarily conveys and implies, must be contained in the oath,"—but, had the oath in substance contained all that was meant by the words "*bona fide*," it would have been sufficient, even under the strictness of construction uniformly applied to the attachment laws of this state. And in *Winingder vs. Diffenderffer*, 5 *Har. & Johns.* 189, which was a case where there was an omission of a word in an oath, the form of which was prescribed by an act of assembly, being an act for the relief of insolvent debtors, the court determined that as the omission "did not change the meaning of the oath, did not materially vary the oath," prescribed by the statute, it was sufficiently well administered. We cannot but think that the obligation of an oath taken by a juror that he will justly and impartially

value land, is as perfect as if the word "*faithfully*" were superadded to them, and inserted in its body.

The objection next to be noticed, is founded upon a supposed failure on the part of the jury to find and declare upon the face of their inquisition, that certain persons, other than the particular land proprietor in this case, were owners of said land, or of some interest or estate therein, and that consequently, they are not bound thereby. It is in proof, and indeed not controverted, that a certain Joseph C. Parker and Robert Stephenson had an outstanding interest or term for years, in a portion of the land condemned, and it is asserted that in the valuation and assessment of damages, the jury took into consideration, and allowed damages for the actual or supposed injury sustained by Messrs. Parker and Stephenson, in consequence of the cutting the canal through the land to be valued, and included the damages so allowed for the actual or supposed injury sustained by these gentlemen, in the amount of damages allowed *Mrs. Archer*, the declared and ascertained owner of the parcel of land by them valued, or intended to be valued. The term "owner" used in the 13th section of the act of 1825, ch. 180, is evidently intended to include every one having any title to, or interest in the land, because it is there provided that the valuation of the jury "shall be conclusive upon all persons, and shall be paid by the president and directors of the *Canal Company* to the owner of the land, or his legal representatives, and on payment thereof, the said company shall be seized of such land as *of an absolute estate in perpetuity* as if conveyed by the owner." In *Ellis vs. Welch*, 6 *Mass.* 251, recognized in *Parks vs. Boston*, 15 *Pick.* 203, this point was so settled. In this last case the court say, "it has been heretofore decided by this court, and apparently upon much consideration, in the case of *Ellis vs. Welch*, *ubi sup.*, that the term "owner," in this statute, includes every person having an interest in real estate capable of being damnified by the laying out of a street through or over it, and is equivalent to the description of "any person damaged in his property" as used in the

general act regulating the laying out of highways. In the same case it is remarked by the court, after saying that in the valuing a piece of land there may be several entirely distinct interests therein, that "such compensation, therefore, must be apportioned among them, according to the relative magnitude, and value of their respective interest; and, of course, *there must be a separate inquiry and a separate award of damages*, upon the complaint and application of each," *id. ibid.* 203, 204. It is true that in both these cases, the interest of the lessee was held under a deed, in one of them for three years, and in the other for a term of five years, but we cannot perceive that this would alter the principle. In *ex parte Janings*, 6 *Cowan*, 525, in which was involved a claim for damages by persons having a right in the flow of water, it is said by the court, "*whatever interest* the claimant of damages may have, he is to be paid for." Again, they remark, (in page 526) "that although the statute says, (as does the Maryland act also) that this acquisition obtained by the appraisal of the jury, or assessors, shall be in *fee simple*," yet the individual claimant, though he "may have only a limited interest, a particular estate for instance, or a *right merely equitable*, the reversion or legal estate residing elsewhere," he shall be compensated. As there are some observations made in the same case by that court, not only relating to the particular point we are now discussing, but which have a bearing also upon another question yet to be considered, we here insert them. The court observe, (*id.* page 526,) "the question as to the extent and value of interest, is one for the appraisors (jury) and respects the amount of damages, and the persons to whom they are to be paid. We see no more difficulty in describing and entering in a book, the *various interests which different persons may have*, in the flow of water, whether immediate, reversionary, legal or equitable, than in designating the like interests in land. It cannot be allowed, because the estate is less than a fee, or because it is merely incidental to or issuing out of land, that therefore the owner should be divested of his right without compensation."

In relation to the objection now under review, we would remark in conclusion of this part of the inquiry, that although it would, in our judgment, have been the safer course to have inserted in the proceedings the names of all the parties claiming title to, or having any interest in, the land sought to be condemned, and to have had an inquiry and apportionment of damages as to each, yet it has been decided by this court in the case of the *Philadelphia, Wilmington and Baltimore Rail Road Company vs. Sappington*, who was in possession of the lands condemned, and was only an owner for life, the property being condemned as fee simple, and as belonging to him absolutely, that this was no ground for setting aside the inquisition, because a court of equity would, upon application, apportion the amount allowed by the inquisition among the parties entitled as owners; and further, in the case now under consideration we think, that upon the evidence it was sufficiently shewn, that the course pursued by the jury in finding their inquisition as they did, that is to say by giving to the fee simple owner the whole amount of the valuation of the absolute estate in perpetuity, and accompanying it with an endorsement thereon of their estimate of the value of the term for years of the tenants (Parker and Stevenson) was adopted by consent of the parties litigant, and it is clear to our minds, that if the tenants were present at the hearing, and acknowledged to be so, as was the effect of such consent, the case of *Griffith vs. Jarrett*, 7 *Har. & Johns.* 73, is decisive of the point that the endorsement forms part of the award, and that the two papers taken together would make a valid and available inquisition in favour of those gentlemen, were it not for other considerations which will appear in the sequel of this opinion. In the language of the learned judge who delivered the judgment of the court in the case last referred to, the endorsement "is signed by all the referees (jurors) who signed the award (inquisition) and was, no doubt, intended to be a part thereof; and no reason is perceived, in point of law, why it should not have that effect. Ascribing to it this faculty of explaining the scope and ope-

ration of the award, (inquisition,) it manifestly results, as a necessary legal consequence, that the award (inquisition) is binding upon the parties," unless it be defective in particulars other than those set forth in this objection, of which defect we shall hereafter speak.

As to the objection that this court has no rightful jurisdiction, nor any power or authority by law, to affirm the said inquisition, because that after the same was taken and returned, the *Canal Company* prayed an appeal therefrom, which appeal was afterwards, in due course, ordered by this court to be removed and transmitted for trial to Baltimore county court, and which was, in pursuance of said order, removed and transmitted accordingly, it is not necessary to do more than to over-rule it, the counsel of the *Canal Company* having stated at the last hearing, and it being manifest, that the objection was merely filed to enable them to bring it to the consideration of this court for a decision without argument, as it had been heretofore decided by Baltimore county court, and their object being to have the benefit of a review of one or the other of those decisions, as might be by them deemed most advisable.

The next objection interposed by the *Canal Company*, which we shall consider, is in the following words, "because the circumstances and relative situation in which the said company and the said proprietor are now placed and stand, are materially varied and changed from what they were at the time the said inquisition was taken; in this, to wit: that at the time of the taking of the said inquisition, the act of assembly passed at December session, 1837, chap. 171, entitled "a supplement to the charter of the *Tide Water Canal Company*," was in full force and operation, and the then counsel of the *Canal Company* who attended on behalf of the company at the taking of the said inquisition, knowing and believing that excessive damages would be allowed by the said jury, did not deem it essential to adduce before said jury, all such facts and arguments as might, and under different circumstances would have been adduced on behalf of the

company, before the said jury; but the said counsel relied upon the right of appeal secured to the said company by said act, as an effectual and certain mode by which the said company might correct the errors, and repair the injustice, which the said jury might commit either from prejudice against the company, from partiality towards the proprietor, from the admission of improper evidence, from misrepresentations of any kind, or from misapprehension of the rules of law—whereas by reason of the repeal of said act, at the last session of the general assembly, the right of appeal so relied upon, has now been taken away from said company. By reason whereof, as the said company alleges and insists, the said inquisition was obtained by surprise, and ought not to be affirmed."

By the act of 1835, chap. 327, which was a supplement to the charter of the Baltimore and Port Deposite Rail Road Company, it was enacted by the second section, that certain commissioners therein named, should decide what damages would be sustained by persons owning lands on Gunpowder river or Bush river, by reason of the construction of any bridge erected, or which might be erected by the said company, across either of said rivers, and should return their proceedings to the clerk of the county, and that either party interested might file a petition to the county court, appealing from, and praying a review of, the decision and assessment of damages, made by said commissioners, and that the court should proceed thereupon itself to inquire and determine upon said claim of damages, or at the request of either party, should order and have a jury trial in the premises, and that the said claim should there be *proceeded with anew as if no decision by commissioners had been made*, and in all other respects as was lawful and usual in jury trials generally in said court, and the jury as in such jury trials being subject to the direction of the court on all points of law. And by the *third* section, it was enacted, that either party should have the same privilege of removing the case of such appeal for trial to an adjoining county, as is now allowed in civil cases in county courts, and

upon the same conditions. By the act of 1837, chap. 171, entitled a supplement to the charter of the *Tide Water Canal Company*, it was enacted that the right of appeal and removal, and course of procedure consequent thereon, secured to the Baltimore and Port Deposite Rail Road Company by the above act of 1835, chap. 327, should be extended and secured to the *Tide Water Canal Company*, upon the finding and return of any inquisition taken under its charter, or affecting the construction or reparation of said canal—in virtue of the privilege conferred by this last act, the *Tide Water Canal Company* removed the proceedings in this cause from Harford to Baltimore county court, but the proceedings themselves before the sheriff and jury who found this inquisition, were had *after* the passage of the last mentioned statute, whilst the same was in full force, but before the order for removal to Baltimore. By the act of December session, 1838, chap. 376, the law of 1837, chap. 171, was repealed, and the cause was remanded to Harford county court. This court has already decided that no such vested rights were acquired by the *Canal Company* under the act which was repealed, as would render invalid, by reason of its unconstitutionality in attempting to impair such rights, the repealing act; but we entertain no doubt that the counsel, in conducting the inquiry before the jury when the first act was in full force, had a right to look to the privileges conferred by it, and if in their judgment, and upon their professional responsibility, they deemed it proper, and as best calculated to subserve the interests of their client, mainly to rely upon their right to have a jury trial under the direction of a court as provided by that act, and to bring before that tribunal the claim for damages set up by the land-holder in this case, in order that the same might be proceeded with anew, as if no inquisition had been taken, we cannot perceive that this court is authorized to say that there was, on the part of counsel, *laches* in so doing, or in their omitting, under such circumstances, to offer testimony to the jury of inquiry. The law then in existence, gave them the right so to conduct the inquiry, and although there has since

been an alteration of the *forum*, and a modification of the remedy, it would not be, as we conceive, an exercise of sound discretion, because it might be productive of injustice to one of the parties, were we now to say, that as the *Canal Company* did not examine before the jury all the evidence which it was then in their power to procure, they shall now be debarred from offering any, and *that* in the very face of an act of the legislature, under which they had the right to submit their whole case to the court to which an appeal was allowed, and which was to proceed on the hearing of that appeal, *de novo*, and in the same manner as if no inquisition had ever been found. The familiar case of an appeal from the judgment of a justice of the peace to a county court will sufficiently illustrate this doctrine, and we here rest it by saying that there is reason, as it seems to us, in this objection of the *Canal Company*, and that even if it had not, in all cases of inquisitions, taken under these statutes, been the practice of the courts to proceed, *de novo*, the grounds upon which this objection is placed, would call for such a course, under the circumstances of this case.

The objections next in order are the following, viz: that the jury, in and by the said inquisition, have not described and ascertained the bounds of the land by them valued, and have not given any sufficient or locatable description of the same; whereas, by the express directions of law, the jury are directed to ascertain and describe the bounds of the land by them valued—also, because the warrant, returned with the said inquisition, and under the authority of which the said sheriff in returning said inquisition, professes to have acted in holding the same, does not specify or describe, with sufficient certainty, the land to be valued by the jury, which the said sheriff was thereby commanded to summon—and further, because, in his return of said inquisition, it is not stated or certified by the said sheriff, that the jury ascertained the bounds of the land by them valued, and the quantity and duration of the interest and estate in the same, required by the said company for its use.

In submitting our views upon this and upon almost all of the preceding objections, we have been induced to do so, mainly because of the multiplicity and novelty of the questions which have been brought before the court, and many of which might again arise, should this case return here from a second jury, and which probably will arise, in some of the cases now depending, and awaiting this decision. It was due also to the able and elaborate argument of the respective counsel who have expended so much labour in their endeavours to enlighten the mind of the court, that they should have something to guide them in the future progress of cases of a novel and even complex character. For the same reason, we will take occasion briefly to intimate our opinion on the point of inquiry now about to be considered. It is objected by the *Canal Company*, that the description of the lands contained in the inquisition, is not sufficiently certain, to enable the party to make a true location of them, and that if there be enough of certainty in that respect, still the jury has not complied with the mandate of the law, which requires them, *in their inquisition*, "to describe and ascertain *the bounds* of the land by them valued." It would extend too much our remarks, already occupying a space far greater than was intended, were we to review the many authorities which were cited and commented upon, by the respective counsel on both sides, with singular ability, not only in reference to the degree of certainty in the description of lands, required in deeds of conveyance, and in the returns of sheriffs as to real estate sold by them under process of law, in all which cases the law is well settled (*Blessing vs. House*, 3 *Gill & Johns.* 295; *Hammond vs. Norris*, 2 *Har. & Johns.* 147; *Thomas vs. Turvy*, 1 *Har. & Gill*, 438; *Clark vs. Belmaer*, 1 *Gill & Johns.* 448); but also in cases of deeds under powers—in cases of awards, where all the necessary circumstances must appear to have been performed—in the analogous cases of extent under an elegit—and of assessment of dower—and in partition. We shall, therefore, content ourselves with observing, that it is clear to us at least, that the object of the legislature being to substi-

tute for the benefit of the *Canal Company*, a title to be acquired by inquisition of a jury, instead of by a deed of conveyance, from the owner of the land who would not consent to convey, and to make the former the muniment of such title, instead of the latter, which was the usual one in case of a purchase, no greater certainty could have been intended in the one, than what was necessary in the other, and that in using the expressions "bounds of the land by them valued," nothing more was meant than that there should be a sufficient description of the property to enable the party to make a true location of it, and that it was not necessary to ascertain it by metes and "bounds," *eo nomine*. We think it also equally clear, that either in the case of a deed of conveyance, or of an inquisition in the nature of an *ad quad damnum*, matters *in pais* may be resorted to, in order to get at the true location. It is said in *Jackson vs. Ambler*, 14 *Johns.* 109, by Mr. Justice *Spencer*, in delivering the opinion of the supreme court of New York, that "no lands can be conveyed by any possible mode of expression, dispensing with the necessity of parol proof to locate it." All that is required in any such case, is, "certainty to a common intent," and that is accomplished where there are objects called for, which can be certainly ascertained, and when so ascertained, will enable us to fulfil the intent, and get at the real thing conveyed. *Id certum est, quod certum reddi potest.* But the more serious part of this inquiry is this, are these lands, as described by the jury in their inquisition, "locatable," to adopt an appropriate word which is used by the court of Appeals in *Blessing vs. House, ubi sup?* In other words, are there "any metes or bounds, or other description, by which its location could be established," or which "would enable him (the sheriff) to make a location of them?" (*Fenwick vs. Floyd*, 1 *Har. & Gill*, 174.) Is there, in the language of another adjudication "sufficient certainty to enable the party to make a true location of them?" (*Clark vs. Belmaer*, 1 *Gill & Johns.* 449, *ub. sup.*) Feeling the full force of the remark of the learned judge who delivered the opinion of the court in the case referred to, at

the argument (8 *Gill & Johns.* 359, *Marshall vs. Greenfield*) and disposed as well as bound to bow to its authority, and making "every reasonable intendment to effectuate the object" which the jury had in view, and regarding the case before us as if it were a judicial sale, and thus within the scope of that decision, we incline to the opinion that the description of the land as set forth in the inquisition is "so entirely vague as to make it uncertain what was intended," and that if this were the case of "grantee against grantor," the property would not pass. In almost all the cases which have been referred to, as supporting the sufficiency of the description as given by the inquisition in the case now before us, either the commencement and termination, and the courses and distances were given, or a plat or diagram accompanied the description and made part of, or was referred to by it, so that the actual location could, at any time, be readily ascertained, (11 *Pick.* 274, *Merrill vs. Inhabs. Berkshire.* 14 *Johns.* 96, 107, *Jackson vs. Ambler.* 27 *Mass.* 211, *Davis vs. Rainsford.*) In the description of the lands which are the subject of the present controversy, there are, as it seems to us, several points of ambiguity, not susceptible of explanation by any parol proof which could be legally received; but that which is, in our judgment, fatal, relates to the places of commencement of the first line of each parcel. The description is, for one parcel, "beginning *at the lands* of Herman Stump, and running thence down the canal and parallel thereto," &c.; and for the second parcel, "beginning *at the lands* of the heirs and devisees of James Stephenson, and running," &c. There is no stake, stone, or other natural boundary or monument referred to as designating the spot at which the starting point on Mr. Stump's land is situate, nor any plan, plat or diagram referred to in the description, which might explain the actual place of beginning. The same remark may be made in relation to the commencement of the first line of the second parcel of land, beginning at the lands of the heirs and devisees of Mr. Stephenson. It was contended that this ambiguity as to the place of beginning, might

be explained, by oral proof, to the officer who might be called to lay off the land, that it was at that point of Stump's lands where the canal first touched. In the language of the learned judge who delivered the opinion of the court in *Thomas vs. Turvy*, 1 *Har. & Gill*, 438, 9, *ub. sup.* we think "the ambiguity on the face of the conveyance (inquisition) could not be explained by extrinsic circumstances," there being no point of beginning mentioned in the description, and no diagram to shew it; so that the place of commencement being uncertain, we could not surmount the difficulty on that score, even by giving to the case of *Makepeace vs. Bancroft*, 12 *Mass.* 469, all the authority which is claimed for it, and allowing as valid in a description of land a reference for its boundary to a monument not actually at the time existing, and not even stated to be staked out, (the then intended canal,) but afterwards made and completed, the parties always meaning to conform, and actually conforming to the description. No such difficulty could now arise, as it is understood that the whole canal is completed along this land, and that the company is in possession of all that they require under the act of assembly. The description which is at least somewhat doubtful as to its certainty could, therefore, now be made, in any future proceeding, with sufficient accuracy, and indeed with perfect certainty.

We do not think, that in a case of a proceeding of this kind, this court has jurisdiction to correct the description in the inquisition, except by consent of parties. It is not like the case of a special verdict, which being returned by a common law jury attending at court, may, in some cases, be corrected. The jury is, in this case, *functus officio*, and the members composing it not having been our officers, or under our control, we cannot correct their act. Nor is it like a sheriff's return of property seized under the attachment laws, where we can, once having obtained jurisdiction, require him as our officer, to correct his return, if defective, according to the facts as they exist. Nor do we think that the tender of a deed which has been made by the proprietor, correcting the

error in the description, and offered to be delivered conditionally, but refused to be accepted by the other party, can alter the case, (*Rail Road Company vs. Bucher*, 7 *Watts*, 33, 35.) And we are not prepared to say, looking at the peculiar nature of this proceeding, and the limited power and control of this court over it, that it does not lie in the mouth of either of the parties, even of the *Canal Company* itself, whose agent furnished to the jury, as it is alleged, the defective description, to take advantage of such defect. If a plaintiff in a case under our attachment laws were to obtain a condemnation, and had levied upon the lands seized by his order under a defective proceeding liable to be quashed on that ground, on motion by subsequent creditors who had attached regularly, we are not prepared to say, in the absence of all authority upon the point, that his own irregular proceeding might not, on his own motion, be set aside by order of court, in order to enable him to issue a new writ, whereby he might obtain satisfaction of his debt, which would, on his first action or process, be certainly lost. To deny him such a privilege, at least in a case where there was no fraud in his previous proceeding, might operate great injury to him. And we can see no reason why the *Canal Company* itself, may not, in a case in which the description it has inadvertently furnished to the jury, is found upon more mature consideration, to be defective, object to the affirmance of the inquisition. It is at least a case of doubt, and we are not satisfied with the description of the lands taken, as set forth in the inquisition, and think there is ground for the objection in this behalf interposed by the *Canal Company*, (*Commonwealth vs. Fisher, et al*, 1 *Penna. Rep.* 466.) It would be advisable, and certainly more safe, that the objections, as well to the inquisition itself, as to the return and warrant, should be obviated, as far as may be practicable, in any future proceeding.

It is further asserted and urged, by way of objection, on the part of the *Canal Company*, to the affirmance of this inquisition, that the jury or some of the jurors, in their valuation and assessment of damages in this case, from misappre-

hension of their duty in the premises, did not act upon their own conclusions, according to the best of their skill and judgment, of and upon matters submitted to them; but adopted and acted upon the opinions of the witnesses, or of some one or more of the witnesses, who were adduced and testified before them on the part and behalf of the proprietor in this case; and regulated their estimate and assessment of damages in this case, in accordance with the opinions so adopted and acted upon, in disregard of, and contrary to their own conclusions, according to the best of their skill and judgment of, and upon the matters submitted to them; and contrary to what they deemed to be right and just.

According to our present recollection of the testimony on this point, given by the jurors themselves, and recalling to ourselves the inference we drew therefrom at the trial, we think it is not entirely clear whether some of the jury were not open to this objection, by reason of their having regarded it as a matter of imperative duty on their part, to regulate their opinions, at least on a portion of the subject matter of the controversy, by that of some of the witnesses. The deduction we drew from their evidence was, that on the subject of the value of the water power, and perhaps of the quarries, they had very little knowledge themselves, and therefore depended greatly, if not entirely, upon that of others who had better information, and were more competent to judge, than they were as they supposed, on those matters, and whom they examined as witnesses. That, in order to decide upon these matters submitted to them, of which they had no particular knowledge, especially as to the water power, they felt themselves at liberty to enlighten their own judgments, by receiving the opinions under oath, of men conversant with such subjects. It has been the practice, heretofore, in cases of this nature, to allow a jury to have evidence adduced on either side, and although there has been, in this state, no decision upon this point, so far as we are informed, we think the practice founded upon reason. In the case of *Parks vs. Boston*, 15 *Pick.* 210, although the

chief justice in delivering the opinion of the court, does say, when speaking of the estimate of damages by a jury "upon view," that "the jury must exercise their own knowledge and experience fully; and perhaps, in most instances, with a competent and intelligent jury, such judgment could not be much aided by the estimates of others, though under oath, in the form of testimony," yet he also remarks, that although he could not perceive why they might not have estimated the damages upon their own experience and judgment, without any evidence *aliundo*, still "they might be at liberty to enlighten their own judgments by the aid of testimony." Surely it would seem to be reasonable to permit them to do so, upon those subjects, at least of which they might not have any very accurate knowledge, or upon which they could not, without information derived from some source, exercise to the best advantage, their own judgment or skill. Whether after hearing the evidence in this case, the jury were governed by the conjectural opinions or hypotheses of the witnesses founded upon arithmetical or other calculations, instead of looking to facts detailed by those witnesses and properly in evidence before them, and whether from these facts the jury drew such inferences as would justify the amount of their assessment, and if they did, whether the conclusions to which they came were such as ought now to be sanctioned upon a full consideration of all the additional testimony which has been taken before the reviewing tribunal, are entirely different questions from that we are now considering. Least it should be supposed, however, that because the oath taken by the jurors, requires them to decide "according to the best of their skill and judgment," they have no right, or ought not to hear any evidence, we will take occasion to remark, for the information of parties in future cases, that we think the jury ought, in addition to the privilege of the view of the lands sought to be condemned, which is accorded to them by the statute, to have if they desire it, or if either party interested offer it, any testimony calculated to enlighten their judgments, or to increase their skill, which

would in ordinary jury trials, be legally admissable before them. We do not say, that they are imperatively bound to decide according to that evidence, without regard to their own opinions formed upon the view of the lands, upon their knowledge of the value of real property in the neighbourhood, and upon their own skill and judgment, which the statute supposes them to possess; but they are to balance the evidence as one of the circumstances and part of the foundation upon which their judgment is to be based, and to give to it due weight. It certainly would not be a proper execution of the duty imposed on them by the act of assembly, were they to regulate their estimate of damages in accordance with the opinions of witnesses, however skilled or scientific, in disregard of, and contrary to their own conclusions, formed according to the best of their skill and judgment, but waived and abandoned because of their conflict with those opinions.

Another objection set up by the *Canal Company*, to the confirmation of the inquisition, is that the right to a portion of the water power claimed by *Mrs. Archer*, and for which she has been allowed damages, by the award of the jury, does not in fact reside in her, but in other persons. It is in evidence before us, that the late Mr. John Stump, of Stafford, the original proprietor of the entire combined water power, tranferred by deed of the tenth day of December, 1798, to the Messrs. Wilsons, a portion of the land to which this water power was attached, say about 33 acres, reserving to himself and his heirs or assigns, the privilege of digging or making a canal through the said land sufficient to convey the water of Deer creek across Rock run for water works or boat navigation, and to enjoy the same for ever, to his and their own proper use and behoof, on their paying to the Wilsons, or their heirs or assigns, any damages they might sustain by said canal, which damages should be left to be settled by persons mutually to be chosen by the parties, if they could not agree among themselves.—That subsequently the Wilsons conveyed a small portion of the land sold to them by Stump,

say about 2 acres, to the late James Stephenson, whose heirs now own it, and that the residue was reconveyed to Stump by the Wilsons. Upon this state of facts, it was contended that the right to *the soil* passed absolutely from Stump by his deed, to the Wilsons, notwithstanding the reservation therein, of the privilege of digging a canal, and that this reservation was only a covenant personal to the parties, not running with the land, but that the right or privilege reserved was to be exercised in the life-time, of the grantor, Stump, and not afterwards. In support of this position, and *e contra* by the opposing counsel, several authorities were referred to, (*Thompson vs. Gregory*, 4 *Johns.* 83; *Vanderburg vs. Van Burgen*, 13 *Johns.* 217; *Russell vs. Scott*, 9 *Cowen*, 280, 1. *Jackson vs. Vermilyea*, 6 *Cowen*, 681; *Pettee vs. Hawes*, 13 *Pick.* 327; *Hills vs. Miller*, 3 *Paige*, 257, 8; *Astor vs. Miller*, 2 *Paige*, 78; 1 *Serg. & Rawl.* 229, *et seq*; *Ex parte Jennings*, 6 *Cowen*, 526; 9 *Wend.* 247;) various other questions were argued, displaying much research and learning on the part of the respective counsel, and growing out of the deeds just mentioned, and other deeds and papers and matters *in pais* given in evidence, which points we do not think ourselves called upon to decide. It would consume too much time, and unnecessarily, and would occupy too large a space, were we to review these cases, and comment upon them and upon the argument of the counsel, in the extended manner we should be obliged to do, were we to enter fully upon the subject. We incline strongly to the opinion that the right to the soil never did pass from Stump, but that even if it did, we are clear that the title to that portion of the water right which is attached to the slip, or small piece of land conveyed by Wilsons to James Stephenson, is vested in *Mrs. Archer*. We think so upon several grounds, which, with a single exception, it will be unnecessary particularly to specify, as well because in doing so we should swell our remarks beyond reasonable bounds, as that they will very naturally suggest themselves to the counsel who spread them out before us, in the argument. It is sufficient to say, that if there were

nothing in this part of the inquiry, except the will of the late James Stephenson, coupled with the facts in evidence before us that his executor, who by the will had the power to sell or dispose of any interest which his testator had in the premises, was present at the taking of this inquisition, and assented to *Mrs. Archer's* being regarded by the jury as the owner of that portion of the water right, leaving the heirs of Stephenson to claim, through the intervention of a court of equity, or other proper tribunal, their distributive share of the amount awarded as damages, should they find that they had any interest or title—and with the further fact that the absolute estate of the same in perpetuity was estimated by the jury and found by their verdict, these facts of themselves would be sufficient to sustain the inquisition, in this branch of the case. We do not feel ourselves at liberty to question the authority of the adjudication in this court, to which we have heretofore referred, (*Sappington's case vs. The Rail Road Company,*) but were we now disposed to re-examine it, we should re-affirm it, having had occasion not long since to consider the question presented by that case, and we approve the principle which was there established. Doctor Sappington was the owner for life only, of the land which was taken for public use, but it was condemned in perpetuity, and was so returned by the jury empannelled, who allowed damages for it as a fee simple estate. The court held that the owner of the remainder of the estate, was bound by the inquisition, although notice was actually given only to the party in possession, the owner for life, and that the former might avail himself of all benefit of the damages awarded, to the extent of his interest, by application to a court of equity for a proper distribution of that fund. We came to the same conclusion, upon considering this question, which although not presented at the trial, was afterwards suggested to us as worthy of inquiry, and received our deliberations in the case of the *Messrs. Whites vs. the Mayor and City Council of Baltimore*, but there was no decision upon this particular point made by us in that case, nor was there any such by the

court of Appeals, so far as we have been able to learn, when our judgment came under review of that tribunal—we do not understand that this particular point has passed under its judgment, and until the principle established by the case of Sappington, shall be deemed erroneous by the court of last resort, we feel disposed to adhere to it, especially as we find that the same doctrine which seemed to us to be the correct one, has since been maintained and enforced in a very elaborate opinion which has been submitted to our inspection, pronounced by that learned and profound jurist Kent, the late chancellor of New York. There is, as we think, for the reasons we have assigned, no cause, so far at least as concerns this particular objection, to quash the inquisition.

The last objection we have to consider, is, that "the damages allowed in this case, are excessive." This objection embraces, among several others, the four specifications contained in the paper, which was first filed as shewing cause why the inquisition should not be confirmed, and they are designated by the numbers, 20, 21, 22, 23.

The jury are instructed by the statute, to "value the land, and all damages the owner thereof shall sustain by cutting the canal through such land, &c."

It must be conceded, that the rule by which damages are to be estimated, is, in all cases, a question of law. The jury are to apply the rule, but the rule itself is to be established by the courts. It is held in Massachusetts, that in trials before a jury of this kind, it is the duty of the sheriff to determine questions of law, (*Merrill vs. Inhabs. of Berkshire*, 11 *Pick.* 274,) and such would seem to be the law in England, (*Leigh vs. Paterson*, 8 *Taunton*, 540. *S. C.* 4 *Serg. & Lowb.* 204. *Gainsforth vs. Carroll*, 9 *Serg. & Lowb.* 204. *S. C.* 2 *Barnw. & Cressw.* 624.) Certain it is, that at the trial, it is necessary for the progress of it, and for the purposes of justice, that the power of determining upon the competency of witnesses, the admissibility of evidence, and other incidental questions arising in the course of the trial, should reside somewhere, and whether it be exercised by the sheriff,

or by the jury, or by both conjointly; it would seem proper that a right of review should be vested in some tribunal of law competent to settle such matters definitively. If, then, the jury have mistaken the rule, and in assessing damages have adopted one which is erroneous in principle, it will not be contended that this inquisition ought to be confirmed, however justly, faithfully and impartially they may have desired, and without doubt did intend, to act, in applying that rule. To confirm the inquisition, under such circumstances, would work injustice as effectually, as if, in applying a true and correct rule of damages, they had assessed an amount far exceeding what the facts of the case would have justified. Analogies, as to a proper rule for the finding of damages, may be drawn from decisions in actions for breach of covenants of seizin and quiet enjoyment, but none can be found in actions of *tort* for unlawfully taking and detaining property belonging to another, because in the latter class of cases one party is a wrong-doer, and we have already said, that the *Canal Company* is, in this proceeding, not to be regarded in that light, but rather as a purchaser of land for a public improvement, the consideration for which is settled by the appraisement of a jury, only because the parties are unable to agree upon that. It is settled that in actions of seizin and quiet enjoyment, after eviction of the purchaser, he cannot recover for the increased value of the land, because the covenant cannot be construed to extend to any thing beyond the subject matter of it, that is, the land as it existed and was worth, when the covenant was made, and not the increased value of it, subsequently arising from causes not existing when the covenant was entered into, (*Cannell vs. McLean*, 6 *Har. & Johns.* 300. *Pitcher vs. Livingston*, 4 *Johns.* 1 *et sequent, to* 23. It is the land, and its price or value at the time of the sale, which was the subject matter of the contract, and which the parties had in view. And we apprehend there would be danger of injustice in adopting any other rule in cases of the nature of that we are now considering. To use the language of Mr. Justice Spencer, in the case just

cited, (4 *Johns.* 13,) such a rule ought to be fixed, as "shall bear analogy to other cases, and attain complete justice between the parties. I am not sensible that any general rule, in almost any given case, will invariably be free from exception. It is the very nature of general rules, sometimes to operate harshly, but the necessity of a fixed standard of justice, is of more importance to the interests of men, than one that is capricious and fluctuating." The only safe rule, as it seems to us, is to look upon this estimate of a jury, just as if it were a case of an intended purchase of the land and of the water rights, quarries and other appurtenances thereto, (supposing the hypothesis to be correct that they were all destroyed, or rendered wholly useless to the proprietor,) and that the jury were called upon as a tribunal, to fix the real fair value of them, as they then existed at the time they were taken by the *Canal Company*, and not as it might be at some future period, arising from causes not existing at that moment. In the language of Mr. Justice Gibson, in delivering the opinion of the supreme court of Pennsylvania, in the case of *The Schuylkill Navigation Company vs. Thoburn*, 7 *Sergt. & Rawl.* 422, recognized as authority by Mr. Justice Baldwin, in delivering the judgment of the circuit Court of the U. S. for the eastern district of Penna. in the case of *Chalkley Atkins vs. Phila. and Trenton Rail Road Company*, (pamphlet cited at the argument,) "the only safe rule is, to inquire what would the property unaffected by the obstruction (canal) have sold for, at the time the injury was committed? What would it have sold for as affected by the injury? The difference is the true measure of compensation." Or, as Mr. Chief Justice Savage says, for the supreme Court of New York, when delivering its decision *in the matter of Albany street*, 11 *Wend.* 153, "it seems to me that the true rule of estimating the damage is, to appraise the property at its present value to the owner, considering the extent of the interest which the owner has, and the qualified rights which may be exercised over it." And Mr. Chief Justice Shaw adopts the same rule in *Parks vs. Boston*, *ub. sup.* 15 *Pick.*

209, where after stating that the taking of private property for public use, is substantially a purchase for its price or actual value on the day of such taking, he remarks, "and what difference can it make to the plaintiff (owner) that his particular estate would have been worth more or less, if he could have kept it to an after period." We think too that the same rule would seem to have been adopted by the supreme court of New York, in 17 *Wendell*, 670, *in the matter of Furman street.* That was a case in which a rule of damages was established as to a person supposed to be greatly benefitted by the extension of a street which passed along the line of his property, and left it, by reason of a deep cutting along that line, exposed to fall down, unless a wall should be erected at considerable expense, to keep it up, and yet no allowance was made to him. The same court had previously, (11 *Wend.* 153 *in the matter of Albany street,*) said, that "clearly the same rule should be adapted for the assessment whether for damage or for benefit." That is to say, there should not be a different rule as to the valuation of property taken for public use, charging persons benefitted by one rule, and allowing to those injured a rate of damages by another and a different rule.—Afterwards, in the case of *Furman street*, 17 *Wend.* 669, Mr. Justice Bronson, in pronouncing the opinion of that court, says, "all classes and conditions of men hold their property subject to the paramount claims of the state; and when it is taken for public purposes, and the question of compensation is presented, the only proper inquiry is, what is its value? The question is not, what estimate does the owner place upon it, but what is its real worth, in the judgment of honest, competent and disinterested men?" And in page 670, he remarks, that "the proper mode of adjusting the question of damages is to inquire, what is the *present value* of the land, and what will it be worth when the contemplated work is completed?" And again, *id. ibid*, "what price will it bring in the market? That is the proper inquiry in a proceeding of this kind. As between individuals, the owner may demand any price,

however exorbitant, for his property; but when it is taken for public purposes, he can only demand its real value. That value cannot depend in any degree on his own will." And in *Fairman vs. Fluck*, 5 *Watts*, 517, in a case somewhat analogous in principle to those already cited, in relation to the measure or standard of damages, the rule adopted in 7 *Serg. & Rawle*, 411, again received the sanction of the court.—See also the decision in 14 *Serg. & Rawle*, 82, 83, and the powerful reasoning of Ch. J. Tilghman, who delivered the opinion of the court.

It was shewn most clearly to our minds, by the evidence at the trial in court, that the jury in estimating the value of the water power on the lands taken from the proprietor in this case, were not governed by any such rule as that which has received the sanction of the courts of Pennsylvania, New York and Massachusetts, (7 *Sergt. & Lowb.* 422, *and case in Circt. Cot. U. S. per Baldwin, Judge, ub. sup.;* 11 *Wend.* 153. 17 *Wend.* 670.; 15 *Pick.* 209,) and which upon principle, independent of all authority, we are satisfied ought to be the rule. Almost any other would involve the subject in utter uncertainty, and render the valuation of property taken in cases of this kind liable to speculative damages and dependent upon possible schemes and contingencies. The jury did not value the water-right of the proprietor in this case, as an *unimproved* power, just as it existed at the time, and assess it at such a price as it would then bring in the market, but having assumed that it would be combined with other water-rights belonging to different persons, they made their valuation upon the basis of speculative profits which in the opinions of various witnesses who were examined before them, would arise in the event of future large investments and expenditures by persons to be interested in an extensive enterprise requiring a large capital. Having heard evidence from several witnesses of the quantity of fall which the combined water power of one or more persons together with that of the land proprietor in this case would give, and as to what the whole would be worth at tide, (the witnesses themselves testing that

valuation by a supposed investment of a large capital to carry on a most extensive business in the sawing of lumber by as many as thirty saw mills, and founding their opinions as well upon that circumstance as upon a hypothetical expenditure, besides of a considerable sum of money for the cutting of a suitable race, the erection of a dam, and the construction and machinery of those mills) the jury likewise acted upon the same test or hypothesis, and based their assessment upon testimony of that character, and instead of awarding what, in their judgment the property would actually at the time sell for, they abandoned their own judgment of the value of the property and gave a sum, such as, in the opinion of the witnesses it might bring, or perhaps ought to produce at some future period, if in the hands of great capitalists embarked in such an extensive enterprise. To show how unjustly such a rule would operate, it would not be difficult to put cases by way of illustration, in reference to the prospective value of property situated in the vicinity of a spot upon which public opinion had universally fixed as the probable site, at no very distant period, of a flourishing city—or we might put the case of lots of ground situated in the neighbourhood of the lands the subject of this controversy, say, for instance, in the town of Havre-de-Grace, and looking forward through the vista of time to the effect of the great improvements now in progress, and the large business which will hereafter be transacted there, when capitalists shall make investments—or even to real estate situated in, or near to the city of Baltimore, when all her hopes and those of the state shall have been realized by the successful termination of those great public works in which both are so zealously engaged. Surely in such cases, it could not, with justice be asserted, that property at either of those sites, should it be wanted immediately for the public use, should be assessed and valued, and paid for, by those who take it for that public purpose, at those prospective prices which are dependent upon contingency and conjectural calculation, no matter how reasonable and even well founded they may appear. We do not mean

to say that a jury would be prohibited, even in these cases put by way of illustration, from taking into consideration the most advantageous use to which property might be applied in the hands of one who is disposed to make it yield the greatest income; on the contrary we admit that such a circumstance would properly form a *datum* or ingredient of the assessment or valuation which they are called upon to make, but still the inquiry would at last be, what price will the property bring at this time, in the market? What will it, under all circumstances, sell for *now*? That price is its intrinsic value. We repeat that it appears to us, that the true value is in reason what it has been shown to be by authority, as well in adjudications, upon lands taken for public use under statutes in the nature of an *ad quod damnum*, as in other analogous cases.

We are further of opinion, from a careful and deliberate consideration of the testimony taken before the court, that however correct the conclusions of the jury may have been from the evidence adduced before them, there is, since the examination before us, at which much additional testimony was given, great reason to think, that they have been mistaken as to facts, and that another examination before a new jury is necessary for the purpose of doing complete justice. We are not satisfied that there was not some error in the calculations of the height of the water-fall on *Mrs. Archer's* land—if they allowed her any thing except for her own water-rights, independent of, and not combined with that of other persons, as some of the jurors certainly did, we think upon the authority of some of the cases herein before referred to, that such an allowance was made on an erroneous principle. And as relates to the fall of the *combined* water power, there was evidence before the court, to show that even if they proceeded upon a correct principle, they may have greatly overestimated that combined water-power. There is evidence from which an inference might be drawn that they erred in their conclusion and correspondent valuation, when they proceeded upon the basis that the quarries were totally de-

stroyed—and there is also evidence worthy of being sent and submitted to a second jury, as it was not before the former one, that the quarries are even more valuable now, than when the canal was not contemplated. The same remark may be made in relation to the conclusions to which the jury came as to the injury done by the cutting of the canal, to the mill, to the landing place, to the Rock Run establishment as a place of business, and to the land taken as part of the island, upon all which subjects we are satisfied from the evidence, that there is at least a reasonable doubt whether justice has been done; and that this inquisition can only be set right by a new trial, which in the words of Lord *Mansfield*, (1 *Burrow*, 393,) "is no more than having the cause more deliberately considered by another jury." In the case of *Abbot vs. Sebor*, 3 *Johns. Cas.* 46, Mr. Justice Kent said that he was of opinion that owing to the "extent of the demand in that case, its complex nature, its importance, its novelty and the uncertainty whether justice has or has not really been done, there are sufficient reasons why it should be re-examined by a jury,"—and in *Pemberton vs. Pemberton*, 13 *Vos.* 299, Lord Chancellor Eldon said, "the ground upon which a new trial ought to be granted, is this: I do not think this question has been sufficiently tried. This court, though it cannot control the conclusion of a jury upon a will, must take care that the cause shall be fully and satisfactorily tried, especially where the question is of great value," &c.

Upon the subject of the award in favour of Messrs. Parker and Stephenson, for the interest or term of years which they had in a portion of the land condemned as belonging to *Mrs. Archer*, and for which they received an allowance of $2,000, endorsed upon the inquisition returned in her case, and to be deducted from the whole amount which was awarded to her, it follows from what has been said upon the subject of the rule as to damages adopted by the jury, that although the award to these gentlemen was not defective by reason of its having been found by way of endorsement on the back of the inquisition returned in the case of *Mrs. Archer*, yet it is

obnoxious to the same erroneous rule of damages which governed the jury in making their estimate. It was in evidence that they were tenants at a certain annual rent, for a term which would expire in the round of a little more than a year, and there being some testimony to show what profits they might possibly, or perhaps probably have made upon their business during that period, had they been left unmolested in the enjoyment of the premises, and as to the loss of custom by their being obliged to relinquish their place of business, the jury were influenced by those considerations and others of a kindred character, and rendered a larger verdict than they would otherwise have found. Such a standard of damages is too uncertain and variable, and falls within the principle of the authorities which have been referred to in a preceding part of this opinion. In *Fairman vs. Fluck*, 5 *Watts*, 516, 518, which was a case of *replevin* for goods taken as a distress for rent, the defence of the tenant was, that the landlord, by the lease covenanted to make certain improvements in the yard attached to the rented premises, which was a wagon-yard tavern house, but did not perform his covenant, by reason whereof the tenant lost his custom as a tavern keeper, and therefore sustained damage to the whole amount of the quarter's rent claimed in that suit. The tenant was allowed to set up as a defence, this breach of covenant on the part of his landlord, but the question was what was the proper measure of damages on such breach. The supreme court of Pennsylvania, after again recognizing the rule established in 7 *Sergt. & Rowle*, 411, *ubi sup.* say, "and in estimating the value of the item, in the present instance, not only are speculative and remote damages to be rejected, but even the proof of a direct loss of business, by showing that a customer went away in consequence of the situation of the yard. Such standards are uncertain and variable, depending on the amount and value of custom, and different with different tenants; whereas the rule ought to be certain and uniform."

If, in addition to the mass of authority we have adduced

in support of the fixed, uniform and certain rule as to damages which we have adopted, it were necessary to call in aid the opinions of learned elementary writers and distinguished jurists, it would not be difficult to do so. We shall content ourselves with one or two extracts. The first is from *Story on Agency*, 216, the work of one eminent for his sound legal knowledge and extensive attainments, and whose opinions among the members of that profession which he adorns, are deservedly held in high estimation. Speaking of a proper standard of damages in cases bearing some analogy to that under our consideration, he says, "but possible or probable future profits or contingent and speculative gains, would constitute no just ingredients in the estimate of such loss or damage, from the uncertainty of their nature, the fluctuating and changeable elements on which they depend, and their inadequacy and unfitness *as a rule* in a great variety of cases, where a wrong has been done, &c." And in the case of *Short vs. Skipwith*, 1 *Brockenbrough's Reports*, 108, containing Chief Justice *Marshall's* decisions, that eminent judge and profound jurist remarks, in an analogous case, "it is said and truly said, that extravagant calculations of conjectural profits are not to be indulged, and will never be regarded in courts of justice as the standards by which damages are to be ascertained." The last extract we shall quote, is from the opinion of the same judge, in delivering the judgment of the supreme court of the United States in *Bell, et al, vs. Cunningham*, 3 *Peter's Sup. Cot. cas.* 86, wherein he says, (it being the case of a breach of the orders of a principal by his agent,) "we do not mean that speculative damages, dependent on possible successive schemes ought ever to be given; but positive and direct loss, resulting plainly and immediately from the breach of orders, may be taken into the estimate." So in the case before us, the jury ought to have allowed damages to the land proprietor, or to any person having an interest in the property, sought to be condemned, for any direct loss, resulting plainly and immediately from the making of the canal thereon. In awarding an amount beyond this

rule, as we think they did, to Messieurs Parker and Stephenson, they erred, and their inquisition must be set aside.

It is therefore this second day of October, in the year 1839, ordered and adjudged by Harford county court, that the inquisition heretofore taken in the case of *Mrs. Ann Archer vs. The Tide Water Canal Company*, and returned to this court, together with the award endorsed thereon in favour of Parker and Stephenson, be, and the same is hereby set aside, and the sheriff of Harford county is hereby required and directed, to cause to be taken with all convenient speed, and in the mode prescribed by the acts of assembly in such case made and provided, another inquisition, and to return the same to this court pursuant to law.

R. B. Magruder,
John Purviance.

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ABATEMENT.

See Pleas and Pleading, 3.

ACTS OF ASSEMBLY.

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APPEAL.

1. An appeal from the judgment of the county courts will not lie in all cases where a writ of error would lie. *Isaac vs. Clarke*, - - 107
2. The act of 1713, ch. 4, applies only to civil cases, and consequently does not embrace proceedings in cases of forcible entry and detainer. *Ib.*
3. A certiorari having issued from the county court to bring before them certain proceedings which had been had before justices of the peace upon a writ of forcible entry and detainer, and the county court having over-ruled exceptions taken thereto, upon which the record was brought by appeal to this court, it was *held* that it would not lie, and the appeal was dismissed, - *Ib.*
4. If the appellant die, before the commencement of the term, to which the appeal is taken, the appeal will abate.—*Hanney vs. Murray*, - - - - - - - - - 157
5. An appeal will not lie by the sheriff, from an order of the county court, directing him to bring into court money which he has received upon an execution. *Sanderson vs. Alcock*, - - - - - - - - 164
7. By the first section of the act of 1818, ch. 204, a party deeming himself aggrieved by the orders or decrees of the Orphans courts, may appeal to the court of Appeals, and the term "party," does not necessarily mean a litigant before the court, when the order or decree is passed, but any one on whose interests such order or decree has a direct tendency to operate injuriously.—*Stevenson et al, vs. Shriver*, - - - - - - - - - 324
8. An order of the Orphans court passing a claim of the executor, or administrator, against the estate, may be appealed from by a distributee or by a creditor, where the assets of the deceased are inadequate to the payment of debts, *Ib.*
9. An appeal will lie from the judgment of the county court, reversing upon error, *coram nobis*, their former judgment, and rendering judgment for costs, in favour of the party suing such writ. *Hawkins vs. Bowie*, - - - - - - 428
10. Although the county court may have erred in the direction given by them to the jury, this court will not reverse the judgment, if the

party appealing has not been prejudiced by the error. *Union Bank vs. Planters' Bank*, - - - 439

AWARD.

1. By the statute 9 and 10, *Wm 3d, ch.* 15, which has been received and adopted in this state, the process of attachment to enforce awards, has been extended to all cases, whether the reference is of an action depending or not; provided, that when no suit is depending, it is stipulated in the agreement, that the submission shall be made a rule of court. *Shriver vs. State use Devilbiss*, - - - - - - - - 1
2. Whether the reference is by rule of court, or agreement out of the court, the power of the arbitrators depends upon the terms of the rule, or the language of the submission, and their proceedings in both cases are the same, - - - - - *Ib.*
3. When a reference is made of a suit depending, the rule of the court recites and evidences the consent of the parties, and the terms of the submission, and is in general the only evidence of the agreement, which in such case need not be in writing, - - - - - - - - *Ib.*
4. In the case of a reference under the statute, the consent must be in writing, and proved in the mode prescribed; but in both cases, the power of the arbitrators depends upon the terms of their appointment, and their awards in each case will be enforced by attachment, *Ib.*
5. By the 8th section of the act of 1778, *ch.* 21, the courts are required to give judgment on awards made in causes instituted, or to be instituted, and to issue execution, as upon judgments on verdict, confession, or *non suit*, and the practice under this act has been to institute a suit, amicably or otherwise, and then by a rule of reference to name the arbitrators, the subjects of the submission, and the time, &c. within which the award is to be returned. This act is remedial, and should receive a liberal interpretation, - - - - - - - - *Ib.*
6. When an award is made and returned pursuant to the act of 1778, *ch.* 21, which the ordinary judgment of the common law courts may direct to be done, and to enforce, which the known executory writs of such courts are the appropriate process, such writs will be issued to enforce the judgment. But if the award should direct that to be done, to compel which, the ordinary writs would be inappropriate, the attachment must be resorted to, as before the act of 1778, - - *Ib.*
7. The act of 1778, has given the remedy by execution, when a cause is instituted, not by means of a previous verdict and judgment, but by directing that judgment shall be entered at once on the award, when returned and ratified as the act requires, - - - - - - - - *Ib.*
8. When a reference is made of a depending suit, the act of 1785, *ch.* 80, *sec.* 11, requires the case to be continued; but the omission to enter the continuances, is merely clerical, and this court can correct the error, without sending the record back to the county court, *Ib.*
9. When a time is limited for the completion of the award by the rule of reference, and the parties afterwards by agreement change the day, this court would hesitate to say, that either party could object that the award was not made within the time first limited, - *Ib.*

BANKS.

See Money Had and Received, 2.

1. When accounts are rendered by one banking institution to another, according to a proved usage between them, and when it was further proved, that in case either objected to the account of the other, it was the usage for the objecting bank to give notice thereof to the other, in the absence of such objection, the jury may infer that the bank receiving the account acquiesces in its correctness. *Union Bank of George Town vs. Planters' Bank*, - - - - - - - - 439
2. The circumstance that the bank receiving the account has suspended payment and general banking operations, can make no difference, when it was in proof that such bank was, notwithstanding, engaged in settling up its business, - - *Ib.*
3. When a bank holding deposites has suspended specie payments, the act of limitation runs against the depositors, from the time the fact of such suspension is known to them, *Ib.*

CONSIDERATION.

It is well settled that, in an action at law upon a single bill, the failure of consideration cannot be inquired into or proved. *Key vs. Knott and Wife*, - - - - - - - - 342

CONSTRUCTION.

1. In all cases of contracts, deeds, and wills, the intention of the parties shall prevail as a rule of construction unless it violates some established principle of law. *Hope vs. Hutchins*, - - - - - - - 77
2. In the construction of a contract of Insurance, as in other cases, the intention of the parties when it can be ascertained, must govern their rights under it. *Maryland Ins. Co. vs. Bossiere*, - - - - - - - 121
3. In construing statutes giving powers, that are to be applied to a great public object, depending for its success upon the judgment of the officers entrusted with its execution, and in whom, there must of necessity be vested large discretionary powers, the interpretation should be liberal. *Tide Water Canal Co. vs. Archer*, - - - - - - - 479

CONSTITUTIONAL LAW.

See Corporation.

CORPORATION.

1. A corporation may be *private*, and yet the act, or charter of incorporation, contain provisions of a purely public character, introduced solely for the public good, and as a general police regulation of the state. *The Regents of the University of Maryland vs. Williams*, - - 365
2. A corporation aggregate, is an artificial intellectual being, composed generally of persons in their natural capacity, but it may also be composed of persons in their political capacity, of members of other corporations, - - - - - - *Ib.*
3. The corporation of "The Regents of the College of Medicine of Maryland," created by the act of 1807, ch. 53, is not destroyed or merged in the corporation of "The Regents of the University of Maryland," created by the act of 1812, ch. 159, independently of the constitution of the United States, or of the bill of rights, and constitution of this state, - - - - - - - - - *Ib.*
4. They exist as distinct and independent corporations, in possession of all the rights and franchises conferred upon them respectively, by the acts of their incorporation; those rights and franchises, being entirely compatible, and the powers and authority of the one, not inconsistent with, or opposed to the powers and authority of the other, *Ib.*
5. The corporation of "The Regents of the University" is a private, and not a public corporation, - - *Ib.*
6. It was not created for political purposes, nor invested with political powers, - - - - - - - - *Ib.*
7. If a corporation be eleemosynary, and private at first, no subsequent endowment of it by the state can change its character, - - - *Ib.*
8. It is not sufficient to render a corporation public, that its ends are public, - - - - - - - - - *Ib.*
9. Whether a corporation be public or private, depends upon the nature of the franchises granted, and not the expected beneficial results to the community, from the possession and exercise of those franchises, *Ib.*
10. Public corporations are to be governed according to the laws of the land, and the government has the sole right as trustee, to inspect, regulate, and control them, whilst the same right in reference to private corporations, appertains to the visitors alone, under the visitatorial power incident to such corporations, - - - - - - - - - *Ib.*
11. Colleges and academies, established for the promotion of piety and learning, and endowed with property by public and private donations, are, in a legal sense, equally with hospitals for the relief of the poor, sick, &c. considered as private eleemosynary corporations. A charter, or act of incorporation, when accepted, is a contract, protected by that clause of the constitution of the United States, which declares, that "no state shall pass any law impairing the obligation of contracts," *Ib.*
12. The act, therefore, incorporating "The Regents of the University," having been accepted, constituted a contract, protected by the constitution of the United States, and the act of 1825, ch. 190, impairing the obligation of that contract, is re-

pugnant to that instrument, and consequently void, - - - - *Ib.*

13. And independently of the constitution of the United States, and of this State, that act is void as opposed to the fundamental principles of right and justice, inherent in the nature and spirit of the social compact, - - - - - - - - - *Ib.*

14. The legislature has no right, without the consent of a corporation, to revoke or alter its charter, or take from it any of its franchises or property; not that a corporation is clothed with any peculiar sanctity, but because its property and franchises *are private property*, and under the safe-guard of the same principle, that protects the property and rights of individuals, - - *Ib.*

15. The act of 1825, professes to discontinue and abolish the corporation of the Regents of the University, and to appoint a board of trustees composed of different persons, and to transfer to them all the franchises and property of the corporation intended to be abolished. In this respect, if effectual, it would amount to a legislative ouster; a legislative judgment of dissolution, and as such in opposition to the 6th article of the bill of rights, which declares, "that the legislative, executive, and judicial powers of the government, ought to be for ever separate and distinct from each other,"—and also to the 21st article of the same instrument, declaring "that no freeman ought to be taken, or imprisoned, or disseized of his freehold, &c. but by the judgment of his peers, or by the law of the land," . *Ib.*

16. It is not necessary to the constitutionality of an act for altering a charter, to the passing of which, previous assent has not been given, that it should by its *terms*, be made to depend upon subsequent assent, - - - - - - - - - *Ib.*

17. The passing of it, with nothing more, amounts to an offer only for acceptance, and if afterwards accepted, either expressly, or by acting under it, it then receives life, and becomes an operative law, *Ib.*

18. But the acts, from which the assent of an existing corporation, to an alteration of its charter, may, and can alone be inferred, must be corporate acts, or acts of its authorized agents, or officers. The acts, or declarations of particular members, do not bind the corporation, *Ib.*

19. Nor can the assent of a corporation to an act, altering, or destroying its charter, be inferred from the fact, that individual members, accepted, and held offices under the new corporation, which it was the object of the act to create, - *Ib.*

20. Neither non-user or mis-user, of corporate franchises, has ever been held sufficient to authorize the granting the same franchises to others, before a forfeiture has been judicially declared, - - - - - *Ib.*

21. An inference of assent by a corporation to an act of assembly after it has been passed, can no more be drawn from a subsequent non-user, or mis-user of its franchises, than an inference of consent to its being passed, can be drawn from a previous non-user or mis-user, - *Ib.*

22. Nor can the non-user by a corporation of its franchises, be considered as equivalent to a surrender of them—that can only be done by deed to the state, - - - - - *Ib.*

23. Neither are courts warranted in presuming a surrender of the corporate rights, and a dissolution of the corporation, from a mere intentional abandonment of the franchises, unless there be something in the act of incorporation to justify it, - - - - - - - - - *Ib.*

24. If either of the faculties of a corporation consisting of integral parts, is lost, and not restored at the time of bringing a suit by such corporation, the action cannot be maintained, - - - - - - - - - *Ib.*

25. But the acceptance of office by the members of one of the faculties of an old, under a new corporation, does not in law amount to a resignation of their offices under the former, nor to a dissolution, or suspension of its franchises, - - *Ib.*

26. An office in a corporation may be resigned in two ways; by an express agreement between the officer and the corporation, or by an agreement implied from his being elected to another office *in the same corporation*, incompatible with it—and such resignation is not complete until the corporation shall have manifested its acceptance of the offer to resign, either by an entry in its books, or electing another per-

son to fill the place, treating it as vacant, - - - - - - - - - *Ib.*
27. When the fact of incorporation is shown by the plaintiff, the burden of showing a dissolution is thrown upon the defendant, - - - *Ib.*
28. A corporation cannot be considered as being composed of distinct, definite, integral parts, unless the number of the members of each class is definite, and a majority of the members of each, is necessary to constitute a corporate meeting or assembly. No advantage can be taken of any non-user or mis-user on the part of a corporation, by any defendant, in any collateral action, *Ib.*
29. There are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter. The one by *scire facias* when there is a *legally* existing body capable of acting, but who have abused their power; the other by information in nature of a *quo warranto*, which applies where there is a corporate body, *de facto* only, who take upon themselves to act, though from some defect in their constitution, or organization, they cannot legally exercise their powers. And the proceedings in both cases must be at the instance of the government, and in no other way, - - - - *Ib.*
30. The defendant, the treasurer of the trustees of the University, was held liable to the corporation of the Regents, in an action for money had and received, for any money to which, as Regents, they could shew themselves entitled, amounting to a sum within the jurisdiction of the court, remaining in the hands of the defendant at the time the suit was brought, and which was received by him, as such treasurer, at any time within the three antecedent years. The act of limitations relied on by the defendant, barring a recovery for previous receipts, - - - - - - - - - *Ib.*
31. If the acts of 1807, ch. 53, and 1812, ch. 159, by conferring authority to grant diplomas, may be regarded as repealing so much of the act of 1798, ch. 105, as provides for the payment of $10 for a license to practise, and imposes a fine for practising without license, and are therefore in violation of the rights conferred by the latter act; they are not for that reason wholly unconstitutional and void, but only so far as the authority to grant diplomas extends, - - - - - - *Ib.*
32. But the right to grant license to practise, for a fee, and to a portion of the penalty for practising without license, given to the Medical and Chirurgical Faculty, by the act of 1798, ch. 105, is not such an inviolable vested right, as to be beyond the reach of the legislature. *Ib.*
33. The act of 1798, in that respect, is penal and sanatory, looking to the health, and lives of the citizen, and as such might be revoked at the pleasure of the legislature. *Ib.*
34. The power in question is a political one, and in granting it to the corporation, the good of the public was the object contemplated, not the regulation, or promotion of private interests, - - - - - *Ib.*
35. An act which only affects, or exhausts itself upon a particular person, or his rights and privileges, and has no relation to the community in general, is rather a sentence than a law, - - - - - - *Ib.*
36. It may be questioned whether an unconstitutional act of the legislature can be made constitutional and valid, by a subsequent acquiescence in it, - - - - - - - - *Ib.*
37. The omission of commissioners, appointed to make a location and plat of a road, to take the oath prescribed by the charter of the company, will not exonerate the subscribers to the stock from the payment of their subscriptions, it not appearing that they were injured by such omission. *Hollman vs. Williamsport Company*, - - 462
38. Nor will the subscribers be exonerated, if the road is not made as wide as directed by the charter, when no injury appears to have resulted from the change, - *Ib.*

COURT OF CHANCERY.

1. The objection, that a commissioner to take evidence under a commission from chancery, had not taken the oath annexed to the commission, is excluded from the consideration of this court by the act of 1832, ch. 302, it not having been made the ground of exception before the chancellor. *Fitzhugh et al, vs. McPherson*, - - - - 51

2. Exceptions filed in chancery under the act of 1832, ch 302, after the decree, will not avail, - - - *Ib.*
3. The design of the legislature was that the grounds of objection adverted to in the act of 1832, ch. 302, should be taken by exceptions filed in the cause before the passage of the decree, that the chancellor whilst decreeing, might have them in view, and that the opposite party might resort to the appropriate means of obviating their effects in chancery, - - - - - - - *Ib.*
4. One of several defendants in equity who had answered the original bill, need not answer an amended bill, the points of amendment not affecting his interest in any way, - *Ib.*
5. Defendants in equity who have not answered an original bill, are by an amended bill called on to answer both together; and the subpœna issued on the amended bill, calls for an answer to both, - - *Ib.*
6. The recital in a decree, that an order to take a bill *pro confesso* unless, &c. had been duly served, is sufficient evidence of the fact of service in the appellate court, *Ib.*
7. G executed a mortgage to secure one debt—G, Jr., D, and M, executed a subsequent mortgage to secure the same and another debt. The mortgagors held different estates in the land, and both the debts came by assignment to the same party. In such a case the chancellor could not decree definitively unless he had all parties before him, and therefore all these subjects could be included in one bill, *Ib.*
8. An order to take a bill *pro confesso*, unless the defendant answers it by a day given, cannot be anticipated, and a decree *pro confesso*, passed in anticipation of such day, - - *Ib.*
9. In considering whether a suitor in court is guilty of a wilful default, the court will not impute to him the same degree of knowledge of the practice of the court as that ordinarily possessed by the solicitors, - - - - - - - - - *Ib.*
10. A party is not liable to pay compound interest on a debt for which he is jointly liable with others, upon their agreement to pay such interest. His assent to such an arrangement must be shown, - *Ib.*
11. An interest may appear to be outstanding, as against one of the defendants in a chancery cause by his admission so as to make its proprietor a necessary party, though at the same time such interest as respects the other defendants, and the complainant in the cause, is barred by lapse of time. The want of such a party in a cause affecting real property and requiring a sale of it, would induce this court to remand the cause under the act of 1832, *ch.* 302, - - - - - *Ib.*
12. The decree which orders a sale of mortgaged property, and its proceeds to be brought into court for distribution, does not settle the rights of the mortgagees, *inter se;* and that there may be a conflict between them after the sale is no ground of reversal, - - - *Ib.*
13. The testator directed that the whole of his estate should be kept together for the payment of debts. He then devised certain lands to his son in fee, and certain *other* lands to the same son and another, in fee, in trust, for the separate use of his daughter (a *feme covert*) and her children, and authorized the trustees to sell the trust estate in case they deemed it proper. On the day of the execution of the will, the testator conveyed to his son the lands mentioned in the devise to him. *Held*, that if the conveyance was made under the especial trust and confidence that the grantee should pay the debts of the testator, it would be a revocation of the first mentioned clause in the will—and the fact that the trustees had sold the land devised to them would be evidence that the testator's debts had been paid. Hence under such allegations the *c. q. t.* need not allege, to entitle her to relief, claiming the execution of the trust, that the debts of the testator had been paid. *Clagett vs. Hall*, - - 81
14. Where evidence taken in the court of chancery has not been made the subject of exception under the act of 1832, ch. 302, sec. 5, objections to its competency are excluded from the consideration of this court, - - - - - - *Ib.*
15. It is error to decree the payment of the proceeds of the separate estate of the wife to herself and her husband, in opposition to the prayer of the bill for relief, though husband and wife are complainants, - *Ib.*

16. A devise in fee to trustees for the use of the daughter of the testator and her children, with directions that the trustees shall not be compelled to pay into the hands of the husband of the daughter any part of the proceeds of the land, but that the same shall remain in the hands of the trustees during the life of her husband, with power to the trustees to sell the trust estate. The trustees having sold, upon a bill to reinvest and enforce the trust the children of the daughter are not necessary parties. As far as the rights of the children are concerned, the will vests the property absolutely in their mother, - - - - *Ib.*

17. A defendent in a chancery cause cannot be examined as a witness without an order of the chancellor to that effect, - - - - - *Ib.*

18. When the substantial merits of an equity case will not be determined by reversing or affirming the decree of the court of chancery or the purposes of justice advanced by doing either, this court remanded the cause to amend the pleadings, make new parties, state further accounts, and take such further testimony as may be necessary, - - - - - *Ib.*

19. A fund arising from the sale of real estate, being, or about to be, brought into the court of chancery, for distribution among the heirs and legal representatives of the party who died seized, a petition was filed in the cause by a party claiming to be a creditor of one of the deceased heirs, who was a married woman at the time of her death, and whose husband survived her, for merchandise sold her before the marriage, (an account of which with the usual probates, was exhibited with the petition,) praying that out of the proportion of the proceeds, his claim might be paid. It was *held*, that the petition presented a case *prima facia* entitled to relief in a court of chancery. *Hays vs. Miles et al.* 193

20. It is not in all cases that a petition is the proper course to reach a fund in chancery, - - - - - - *Ib.*

21. If new parties are to be made, not necessary to the original bill, and where the investigation may involve inquiries calculated, by protracting the cause, to delay parties not interested in such new enquiries, the proceeding must be by bill, - *Ib*

22. But a petition is the proper course to affect a fund in equity, when no other parties are to be brought in to litigate the questions presented by it, than such as are, or ought to have been parties to the original bill, - - - - - - - - *Ib.*

23. If a party having applied to a court of equity for an injunction, be frustrated, afterwards apply to another court of concurrent jurisdiction, upon the same grounds, without disclosing the first application, the party aggrieved may apply in a summary way for relief, and the court in which the second cause is depending, will at once extend it to him. *Wood vs. Bruce*, - 215

24. But where the second application is not upon the same identical grounds as the first, the injunction granted upon the former, should not be disolved without answer, or at all events, without notice to the complainant, - - - - - - *Ib.*

25. And the circumstance that a long period had elapsed from the time the second bill was filed, before any proceeding was adopted by the defendant, is an additional reason why an answer should be required, *Ib.*

26. Under the act of 1820, ch. 161, upon a bill filed on the 23rd of June, 1835, if the *subpœna* is returned served to the then ensuing July term, and the defendant does not appear, an interlocutory decree may pass against him, and an *ex parte* commission issue to prove the allegations of the bill. *Grove vs. Fresh*, - - - - - - - 280

27. Upon the return of the commission, the bill is not to be taken *pro confesso* against such defendant; though if there be also a non-resident defendant, against whom an order of publication has been passed, it is indispensible to a final decree that the bill should be taken *pro confesso*, as against the latter, the proof under the commission not being binding upon him, - - *Ib.*

28. Multifariousness in a bill must be taken advantage of by demurrer, and it is no excuse for not having presented the objection in that form, that the defendant had not appeared in court at the proper time, after having been summoned to do so, *Ib.*

29. A decree which directs the payment of money, without actual or constructive proof of its receipt by the party directed to pay it, or of its

loss by his negligence or misconduct, is erroneous, - - - - *Ib.*
30. And where it was shown that the defendant had received a certificate of debt from the canal company, in December, 1833, or January, 1834, and the bill which assumed its payment to him was filed in June, 1835, it was held to be too short a time to make the presumption, so as to charge him personally, - - *Ib.*
31. Upon a bill for an account, filed by one partner against his co-partners, after the termination of the partnership, all the parties are regarded as actors, and the decree must settle the partnership concerns as if each partner was a complainant, filing a bill against his co-partners, - *Ib.*
32. The claims of the complainants and the defendants, and of the defendants, *inter se*, must all be determined, - - - - - - - - - *Ib.*
34. *Quere.*—Whether a decree would be reversed, which merely settles the rights of the complainant and defendants, when the latter had not appeared in the court of chancery before the decree, and consequently filed no exceptions to the accounts of the auditor, upon which the decree was based, - - - - - - *Ib.*
35. Under the act of 1832, ch. 302, the objection that evidence is derived from hearsay, must be taken by exception in the chancery court, and if not so taken in that court, cannot be made here. *Key vs. Knott and Wife*, - - - - - - - 342
36. When application is made by a defendant in a court of law to the court of chancery, for relief against the judgment, upon facts, in relation to which the proof is contradictory, it is in the discretion of the chancery court to decide the facts, or send an issue to be tried in a court of law, - - - - - - *Ib.*
37. The principles and powers of the court of chancery in England at the time of the revolution, not altered by our legislation, nor inapplicable to our political institutions, are the same by which the court of chancery of Maryland is governed. *Amelung vs. Seekamp*, - - 468

DEVISE.

See Court of Chancery, 13.
Evidence, 7.

DIPLOMA.

See Corporation, 31, 32, 33, 34.

DONATION.

1. When the donor of personal property declared in the deed of gift, that she should not be debarred or prevented from holding, using, or enjoying the property granted, and all profits arising therefrom during her natural life, this reservation does not qualify the adsolute character of the grant except only so far as to enable the donor to use either the subject granted, or *its increase* during her life, though the donor remained in possession till her death. *Hope vs. Hutchins*, 77

ERROR CORAM NOBIS.

See Practice, 5, 6, 8, 9.

EVIDENCE.

1. The letters of an agent, written to his principal, touching the conduct of a negro, whom the principal, the owner had agreed to set free, on the payment of a certain sum of money, rejected as inadmissible, being of no more efficacy than unsworn declarations. *Bland and Woolfolk vs. Dowling*, - - - 19
2. Evidence to establish a particular usage of a bank rejected, when the officer by whom the usage was offered to be proved, spoke of but a single case of the kind referred to. *Duvall vs. Farmers' Bank*, - 31
See Practice in Chancery, 1.
3. C, as the agent of D, executed an assignment of a mortgage to B, in 1806. The mortgagors for about twenty-five years continued, time after time, to pay to B, and those claiming under him, interest due on the debts assigned. One defendant admitted the appointment of the agent, and others gave bond to the assignee to secure the debt. Under such circumstances, no express proof of the agent's power to make the assignment is necessary. *Fitzhugh et al, vs. McPherson*, - 51
4. Where a deed is charged to be fraudulent, or a secret trust to be its real consideration, and when the consideration recited in it has *not* been disproved, evidence of colateral circumstances, showing an additional consideration not expressed in the deed, may be received to repel the fraud or the secret trust. *Clagett and Hill vs. Hall*, - 81
8. Where it is not alleged or proved, that by fraud, surprise, or mistake,

a clause converting an absolute deed into a deed of trust, was omitted to be inserted, it would be inconsistent with the best established principles of the law of evidence, to add a new and important clause, altering the terms of such deed, by the admission of parol evidence showing that such a trust was attached thereto, - - - - - 81

6. One who has purchased a part of the real estate of a deceased party, in a controversy intended to establish a secret trust as effecting a conveyance of such deceased party, by which the grantee agreed to pay the grantor's debts, is not a competent witness to establish such secret trust, as he thereby provides a fund for the payment of debts, and so far exonerates his own purchase, - - - - - - - - - *Ib.*

7. A paper in the following terms was offered to the orphans' court of *Carroll* county for probate:

"*August* 12*th*, 1836.

"This will certify that I do assign, and *gave* all my personal property unto *George Wareham*—that is to say, one silver watch, one chest, *one beaurough*, and some carpenters' tools, besides two notes of hand, one $200, and one of $89, and $18 book account.

"Signed by me in presence of *Thomas Sater*.

His
"PHILIP ⋈ SELLERS."
Mark.

And the subscribing witness being produced, to prove the execution of the same, and that from conversation with the deceased at the time, and from other circumstances, that the said paper was executed as the last will and testament of the party; which proof was rejected by the orphans' court, and the paper rejected.—*Held* on appeal, that the testimony should have been received, and the decree was reversed, and the record remanded for that purpose. *Wareham vs. Sellers*, 98

8. The authority to commissioners to take testimony is special, and must be strictly pursued. *Maryland Ins. Co. vs. Bossiere*, - - - - 121

9. Evidence taken under a commission in which a different person from one of the commissioners named therein acted, rejected as inadmissible, - - - - - - *Ib.*

10. Commissioners have no authority to propound any questions to the witnesses but those which are sent out with the commission, and the answers to such questions should not be suffered to go to the jury, *Ib.*

11. To enable the jury correctly to estimate the value of negro services, it is sufficient to show by evidence, the annual value of negroes of the same description as those mentioned in the inventory. *Wilson vs. Negro Ann Barnett*, - - - 158

12. An acknowledged exception to the rule, which prohibits a party from producing his own declarations in his favour, is, where such declarations are necessary to explain an act, which takes its *character* from the *design and intention* of the party who does it. *Cross, et al vs. Black*, - - - - - 198

13. Declarations made by the owner of slaves, when about to remove with them from this state, and when making preparations for that purpose, are admissible evidence, upon a petition filed by such slaves against the owner for freedom, to shew the place to which the owner intended to remove; though the petitioners had offered no evidence of his declarations made at the same time and place, - - - - - - - *Ib.*

14. The copy of a contract between private persons and the Chesapeake and Ohio Canal Company, is not evidence, though signed by its clerk, and though the company upon application refuse to suffer the parties interested to have the original to return under the commission. *Grove vs. Fresh*, - - - - - - 280

15. Under the act of 1832, ch. 302, the objection that evidence is derived from hearsay, must be taken by exception in the chancery court, and if not so taken in that court, cannot be made here. *Key vs. Knott and Wife*, - - - - - 342

EXECUTORS AND ADMINISTRATORS.

1. As a general rule, an executor, or administrator will be made to pay interest to the distributees on a balance admitted to be in his hands, and payable to them, in a legal course of administration. And where an administratrix had retained in her hands a sum of money, due to the party entitled as

distributee, without applying to the court pending a controversy in relation to the title thereto, for permission to deposite, or dispose of it, so as to prevent the accumulation of interest, she was held liable to pay interest. *Thomas vs. Frederick County School*, - - - 115

2. The decision of the orphans' court, when not appealed from, is conclusive, as to the per centum to be allowed an executor, or administrator for commissions, - - *Ib.*
3. No allowance for commissions should be made upon the interest, chargeable to an executor, or administrator, for delaying the payment of the principal sum, - *Ib.*
4. When it appears by the inventory returned by an executor or administrator, that he is in possession of negro property belonging to the deceased, he is properly chargeable with their hire, or the value of their services, unless he shows by proof, an adequate excuse for not having received such hire, or value. *Wilson vs. Negro Ann Barnett*, - 158
5. And upon a petition for freedom, such charge is a proper item, in estimating the value of the deceased's personal estate, exclusive of the negroes; when their right to freedom depends upon the assets being sufficient to pay debts, independently of them, - - - *Ib.*
6. To enable the jury correctly to estimate the value of their services, it is sufficient to show by evidence the annual value of negroes of the same description as those mentioned in the inventory, - - - *Ib.*
7. When the right to freedom depends upon the sufficiency of the assets of the testator to pay debts, the inquiry is not limited to the condition of his estate at the period of his death. If the assets were sufficient at that time, but in a due course of administration, and before the executor's assent to the freedom, and without his fault, the estate without the negroes, become inadequate, the right to freedom would not exist, - - - - - *Ib.*
8. And so, if the assets are insufficient, at the testator's death, but by subsequent events, and in a due course of administration, they become sufficient, the claim to freedom could not be resisted,- - *Ib.*
9. An executor who has returned a slave in his inventory of the estate of his testator, is not therefore estopped from shewing, in resisting the slave's right to freedom, under the will of his testator, that he was the property of another. *Negro Harriet vs. Ridgely*, - - - - - 174
10. Such inventory is not conclusive upon the executor, or any one else; upon proof of error, he may get credit in the orphans' court, or when called to account, by the creditors, or distributees of his testator, *Ib.*

FRAUD.

See Sales of Personal Property, 2, 3, 5, 6, 7.

INJUNCTION.

1. An injunction will not be granted in England to restrain the commission of a mere trespass; nor will an injunction for that purpose be granted in Maryland, pending proceedings at law to try the right, except in cases of irreparable mischief, or to prevent a multiplicity of suits, or where peculiar circumstances imperatively demand such a conservative remedy. *Amelung vs. Seekamp*, - - - - - - - - - 468
2. The mere allegation of a complainant, that irremediable damage or irreparable mischief will ensue, is not sufficient; but to entitle the party to an injunction, the facts must be stated, to shew that the apprehension of injury is well founded, *Ib.*
3. Under the acts of 1835, ch. 346 and 380, an appeal will not lie from an order granting, or from the refusal to dissolve an injunction, until the defendant has filed his answer, and when an answer has been ruled insufficient upon exceptions, it is regarded as no answer. *Richter & Wheat vs. Pue and Wife*, - 475

INQUISITION.

See Jury.

INSURANCE.

1. In the construction of a contract of insurance, as in other cases, the intention of the parties, when it can be ascertained, must govern their rights under it. The order when adopted into the policy, forms a part of it, and is to be adverted to, and considered in giving it a construction. *Maryland Insurance Co. vs. Bossiere*, - - - - - - 121

2. It is an established principle in the law of insurance, that the underwriters are presumed to be acquainted, with the nature and course of the voyage, which they undertake to insure, - - - - - - - - *Ib.*

3. Where insurance was effected on a cargo, at and from St. A. with liberty of two ports on the Spanish main, and at and from any of them to B, by a policy subscribed on the 4th day of April, 1831, upon an order therein referred to as follows: "$4,500 insurance is wanted, on cargo of schooner *Argonaut, Capt. Maginney*, at and from *St. Andreas*, with liberty of two ports on the Spanish main, and at and from any of them to Baltimore, with a return for each port not used. *Captain Drinkwater*, of the schooner *Desiah*, arrived here a few days since from *San Blas*, and reports that the *Argonaut* sailed from *San Blas* for *St. Andreas* about the middle of February to trade, which is the last account received of her proceedings"—and the loss occurring on the voyage from *San Blas* to *St. Andreas*, it was *held* that the insurers were not liable, the loss happening before the risk commenced.

4. The order for the insurance was intended to define with certainty the voyage to be insured, and to obviate all mistake upon that subject, - - - - - - - - - *Ib.*

5. Upon a policy of insurance on cargo as interest may appear—the vessel arrived at her port of destination, and delivered a part of her cargo in safety. In the progress of a regular delivery of the balance, it was partially damaged by the perils of the seas. In an action for a partial loss, *it was held*, that although the amount of the particular loss did not amount to five per centum on the whole value of the cargo shipped by the insured, still he was entitled to recover, the loss being more than *five* per cent. on the amount at risk at the time of the damage. *Maryland Insurance Co. vs. Bosley*, - - - - - - 337

INTEREST.

1. Mortgagors cannot agree to compound interest, and make it a charge on the mortgaged premises, to the prejudice of any portion of the mortgagees secured by such mortgage, or to the prejudice of subsequent mortgagees of the same property. *Fitzhugh, et al vs. McPherson*, - - - - - - - - 51

2. A party is not liable to pay compound interest on a debt for which he is jointly liable with others, upon their agreement to pay such interest. His assent to such an arrangement must be shown, - - - *Ib.*

3. When the proceeds of a trust estate are enjoined in the hands of an agent of the trustee appointed to collect, and both principal and agent called upon to bring the money into court, the principal is not ordinarily bound to pay interest during the continuance of the injunction. *Clagett & Hill vs. Hall*, 80

4. As a general rule, an executor, or administrator will be made to pay interest to the distributees on a balance admitted to be in his hands, and payable to them, in a legal course of administration. And where an administratrix had retained in her hands a sum of money, due to the party entitled as distributee, without applying to the court pending the controversy in relation to the title thereto, for permission to deposite, or dispose of it, so as to prevent the accumulation of interest, she was held liable to pay interest. *Thomas vs. Frederick County School*, - - - 115

5. No allowance for commissions should be made upon the interest, chargeable to an executor, or administrator, for delaying the payment of the principal sum, - *Ib.*

JUDGMENT.

1. The principle is well settled, that the judgments of an inferior jurisdiction will not be reversed, except for errors apparent, and that they will be sustained by every fair legal intendment, in favour of their correctness. *State vs. Harrison, et al*, - - - - - - - - - 15

JURY.

1. A jury summoned under the act of 1825, ch. 180, to assess the amount of damages sustained by the owners of property, though at liberty to enlighten their judgments by the testimony of others, are not as

ordinary juries are, bound by the weight of evidence. *Tide Water Canal Co. vs. Archer*, - - 479

2. They may be governed by the "view," which they take of the lands to be valued by them, when they meet thereon, - - - - - *Ib.*
3. In deciding questions of fact, in which the verdict of an ordinary jury would not be disturbed, their decision would be open upon review by the court, - - - - *Ib.*
4. In cases under this statute, and other kindred ones, the reviewing tribunal may hear new evidence, against the inquisition, and set it aside upon such new evidence, though upon the proof submitted to the jury the verdict was right, *Ib.*
5. The proceedings of the jury under this law and others like it, are not to be regarded as those of a common law jury, and the jurors who signed the inquisition, may be examined as witnesses, in order to ascertain whether their verdict was not the result of mistake of fact, or of law, *Ib.*
6. That the sheriff who summoned the jury, may have been partial to, or prejudiced in favour of, one of the parties, is not *per se*, sufficient to set aside the inquisition, if it appears that no injustice has been done, - - - - - - - - - *Ib.*
7. The objection, that a juror is related to the parties, or interested in the land to be condemned, should be taken by way of challenge, before he is sworn, and comes too late upon a motion to vacate the inquisition, - - - - - - - - - *Ib.*
8. In cases of inquisition, to condemn property under this law and others of a like nature, all the papers returned by the sheriff are to be regarded as one whole, each constituting a part of the other, and to be construed together, as a record of the proceedings, - - - - *Ib.*
9. The inquisition itself, need not assert upon its face, that the sheriff administered an oath to every juryman, - - - - - - - - - *Ib.*
10. It is sufficient if the fact appears by his return, and the very language of the oath prescribed by the statute need not be followed, if the substance is preserved, - - *Ib.*
11. If other persons besides the particular proprietor in the case, have an interest in the land condemned, it is not a valid objection, that such interests do not appear upon the face of the inquisition, - - *Ib.*
12. Where an appeal is allowed by law from the finding of the jury, and upon such appeal, the case is to be tried *de novo*, as if no finding had taken place, it is not *laches* in either party, that he offered no evidence, or forbore to offer all his evidence upon the first trial,—and if the law granting the appeal is repealed before the appeal is heard, that does not deprive the party in shewing cause against the inquisition, in the original court of the privilege of offering the proof, which he omitted before, relying upon his right of appeal, - - - - - *Ib.*
13. It is not necessary that the jury in their inquisition, should describe the lands by metes and bounds.—If the description is such as to enable the party to make a true location, it is sufficient; and as in cases of deeds of conveyance, and inquisitions in the nature of *ad quod damnum*; matters in *pais*, may be resorted to, to arrive at the true location, - - - - - - - - - *Ib.*
14. But where the first line of a parcel of land was described, as "beginning at the lands of H. S. and running thence down the canal, and parallel thereto," and no natural boundary, plat or diagram was referred to, as designating the spot at which the starting point on the lands of H. S. was situated, the description was held insufficient, and incurable by a resort to extrinsic circumstances, - - - - - *Ib.*
15. The court in a proceeding of this kind has no jurisdiction to correct the description, except by consent of parties.—Nor would the tender of a deed by the land proprietor, correcting the description, but refused by the other party, vary the case; and it *seems* that either party may take advantage of the defect, - - - - - - - - - *Ib.*
16. If the party in possession of the land have but a life estate, and the jury condemn it in perpetuity, and allow damages as for a fee simple, the whole estate is bound by the inquisition, though notice is only given to the party in possession, the owner for life, and the proprietor of the fee may get his proportion of

the damages by applying to chancery for a distribution, - - - *Ib.*
17. The rule by which damages are to be estimated, is in all cases a question of law, though the application of it is for the jury, - *Ib.*
18. In estimating the value of property condemned for the public use, the jury should give the proprietor what, in their judgment, it would actually *at the time*, sell for, and not what it might bring, or perhaps ought to produce at some future period, - - - - - - - - *Ib.*
19. Possible or probable profits resulting from the enjoyment of the property, are not proper to be considered by the jury in making up their verdict; but they should limit themselves to the direct loss sustained by the owner, or other persons having an interest in the property sought to be condemned, *Ib.*

LACHES.

See Promissory Notes and Bills of Exchange, 8.
See Jury, 12.

LEGACY.

1. A testator bequeathed to his two grandaughters $9,000 each, with a direction that the said "legacy should be understood and deemed as given and bequeathed unto them, as their property respectively, and not either to their respective husbands or to their father," &c. *Stevenson, et al vs. Shriver,* - - 324
2. In a subseqent clause the testator said, "it is my will that if either of my said grandaughters should die under the age of 21 years unmarried, and without having any child or children, as aforesaid," then over to the survivor, &c. - - - - *Ib.*
3. Upon this will it was *held*, that upon the marriage of either of the legatees, the legacy vested absolutely in her, and that such portion of it as was received by her husband during coverture, in virtue of his marital rights, became his property, for which his estate could not be charged by his widow after his death, - - - - - - - - *Ib.*

LICENSE TO PRACTICE MEDICINE.

See Corporation, 31, 32, 33, 34.

LIMITATIONS.

1. When a bank holding deposites has suspended specie payments, the act of limitations runs against the depositors, from the time the fact of such suspension is known to them. *Union Bank, George Town vs. Planters' Bank,* - - - - 439
2. A party cannot avail himself of the exception in the act of limitations, in favor of accounts between merchant and merchant, without relying on such exception in his pleadings, - - - - - - *Ib.*

MARITAL RIGHTS.

See Legacy.

MASTER AND APPRENTICE.

See Orphans' Court, 7.

MONEY HAD AND RECEIVED.

1. A party who sells property and receives the proceeds thereof as the agent of another, who held the same in trust, is liable to said trustee, in an action for money had and received, notwithstanding the *cestui que trust* knew of, and consented to the sale. *Chapman vs. Morris,* - 101
2. A bank receiving a draft for collection, is liable in an action for money had and received to the true owner, provided notice of such ownership is given, before the proceeds are paid over to the depositor of the draft. *Union Bank vs. Johnson & Glenn,* - - - - - - - 297

MORTGAGE.

1. Mortgagors cannot agree to compound interest and make it a charge on the mortgaged premises, to the prejudice of any portion of the mortgagees secured by such mortgage, or to the prejudice of subsequent mortgagees of the same property. *Fitzhugh, et al vs. McPherson,* - - - - - - - - 51
2. The decree which orders a sale of property mortgaged, and its proceeds to be brought in for distribution does not settle the right of the mortgagees *inter se;* and that there may be a conflict between them after the sale, is no ground of reversal, - - - - - - - - *Ib.*

MULTIFARIOUSNESS.

1. Multifariousness in a bill must be taken advantage of by demurrer,

and it is no excuse for not having presented the objection in that form, that the defendant had not appeared in court at the proper time, after having been summoned to do so. *Grove vs. Fresh*, - - - - 280

ORPHANS COURT.

See Evidence, 7.

1. The decision of the orphans court, when not appealed from, is conclusive, as to the per centum to be allowed an executor, or administrator for commissions. *Thomas vs. Frederick County School*, - - - 115
2. By the first section of the act of 1818, ch. 204, a party deeming himself aggrieved by the orders or decrees of the orphans courts, may appeal to the court of appeals, and the term "party" does not necessarily mean a litigant before the court, when the order or decree is passed, but any one on whose interests such order or decree has a direct tendency to operate injuriously. *Stevenson, et al vs. Shriver and Wife*, 324.
3. An order of the orphans court passing a claim of the executor, or administrator, against the estate, may be appealed from by a distributee or by a creditor, where the assets of the deceased are inadequate to the payment of debts, - - - - *Ib.*
4. The power of the orphans courts in passing claims against the estate of the deceased, is not confined to strictly legal claims, but embraces every species of indebtedness, whether legal or equitable; nor is their authority in this respect limited to such as are proved according to the act of 1785, ch. 46, - *Ib.*
5. They do not derive their power to pass open accounts from the 8th sec. of the 9th sub ch. of the act of 1798, ch. 101, nor are their powers on that subject imperatively restricted by it. The object of that section was to restrain the authority of executors and administrators in the payment of open accounts, not passed by the court, to such as were proved in the mode thereby prescribed, - - - - - - *Ib.*
6. The power of the orphans courts in passing accounts before payment, is derived from the second section of the act of February session, 1777, ch. 8, and the first section of the 15th sub ch. of the testamentary system, - - - - - - - - *Ib.*
7. The orphans courts have no jurisdiction to decide upon controversies between master and apprentice. *Caton vs. Carter*, - - - - 476

PLEADING IN EQUITY.

1. Multifariousness in a bill must be taken advantage of by demurrer, and it is no excuse for not having presented the objection in that form that the defendant had not appeared in court at the proper time, after having been summoned to do so. *Grove vs. Fresh*, - - - - 280

PLEAS AND PLEADING.

1. Whether two defendants can be sued jointly in *replevin*, for several parcels of property, severally owned, and separately taken and detained? *Quere*. *Powell, et al vs. Bradlee*, - - - - - - - 220
2. But the defect of such misjoinder, (if it be one,) may be cured by putting the party to his election; or by the verdict of the jury, finding for the plaintiff on one count, and for the defendant on the other, *Ib.*
3. The death of the plaintiff before the impetration of the writ should be pleaded in abatement. *Hawkins vs. Bowie*, - - - - - - 428
4. A party cannot avail himself of the exception in the act of limitations, in favour of accounts between merchant and merchant, concerning the trade of merchandise, without relying on such exception in his pleadings. *Union Bank vs. Planters' Bank*, - - - - 439

POST NOTES.

See Promissory Notes and Bills of Exchange, 8, 9.

PRACTICE IN CHANCERY.

1. The objection, that a commissioner to take evidence under a commission from chancery, had not taken the oath annexed to the commission, is excluded from the consideration of this court by the act of 1832, ch. 302, it not having been made the ground of exception before the chancellor. *Fitzhugh, et al vs. McPherson*, - - - - - - - 51
2. Exceptions filed in chancery under the act of 1832, ch. 302, after the decree, will not avail, - - - *Ib.*
3. The design of the legislature was that the grounds of objection ad-

verted to in the act of 1832, ch. 302, should be taken by exceptions filed in the cause before the passage of the decree, that the chancellor whilst decreeing might have them in view, and that the opposite party might resort to the appropriate means of obviating their effects in chancery, - - - - - - *Ib.*

4. One of several defendants in equity who had answered the original bill, need not answer an amended bill, the points of amendment not affecting his interest in any way, - - - - - - - - - *Ib.*

5. Defendants in equity who have not answered an original bill, are by an amended bill called on to answer both together; and the subpœna issued on the amended bill, calls for an answer to both, - - - *Ib.*

6. The recital in a decree that an order to take a bill *pro confesso* unless, &c., had been duly served, is sufficient evidence of the fact of service in the appellate court, - - - *Ib.*

7. G. executed a mortgage to secure one debt—G. Jr., D. and M. executed a subsequent mortgage to secure the same and another debt. The mortgagors held different estates in the land, and both the debts came by assignment to the same party. In such a case the chancellor could not decree definitively unless he had all parties before him, and therefore all these subjects could be included in one bill, - *Ib.*

8. An order to take a bill *pro confesso*, unless the defendant answers it by a day given cannot be anticipated, and a decree *pro confesso* passed in anticipation of such day, - *Ib.*

9. In considering whether a suitor in court is guilty of a wilful default, the court will not impute to him the same degree of knowledge of the practice of the court as that ordinarily possessed by the solicitors. *Ib.*

10. An interest may appear to be outstanding, as against one of the defendants in a chancery cause by his admission so as to make its proprietor a necessary party, though at the same time such interest as respects the other defendants, and the complainant in the cause, is barred by lapse of time. The want of such a party in a cause affecting real property and requiring a sale of it, would induce this court to remand the cause under the act of 1832, ch. 302, - - - - - - - - - *Ib.*

11. The decree which orders the sale of mortgaged property, and its proceeds to be brought in for distribution, does not settle the rights of the mortgagees *inter se;* and that there may be a conflict between them is no ground of reversal, *Ib.*

12. Where evidence taken in the court of chancery, has not been made the subject of exception, under the act of 1832, ch. 302, sec. 5, objections to its competency are excluded from the consideration of this court. *Claggett and Hill vs. Hall,* - - - - - - - - - 81

13. A defendant in a chancery cause cannot be examined as a witness, without an order of the chancellor to that effect, - - - - - *Ib.*

14. When the substantial merits of an equity cause, will not be determined by reversing or affirming the decree of the chancellor, or the purposes of justice be advanced by doing either; this court will remand the cause, to amend the pleadings, make new parties, state further accounts, and take such further testimony as may be necessary, - *Ib.*

15. It is the uniform practice at law, where some of the issues are found for the plaintiff, and others for the defendants, to allow costs to the party, in whose favour the final judgment is given, and such is the general rule in chancery. *Thomas vs. Frederick County School,* - 115

16. It is not in all cases that a petition is the proper course to reach a fund in chancery. *Hays vs. Miles, et al,* - - - - - - - - - 193

17. If new parties are to be made, not necessary to the original bill, and where the investigation may involve inquiries, calculated by protracting the cause, to delay parties not interested in such new inquiries, the proceeding must be by bill, - - - - - - - - - - *Ib.*

18. But a petition is the proper course to affect a fund in equity, when no other parties are to be brought in to litigate the questions presented by it, than such as are, or ought to have been, parties to the original bill, - - - - - - - - - - *Ib.*

19. If a party having applied to a court of equity for an injunction, be frustrated, afterwards apply to

another court of concurrent jurisdiction, upon the same grounds, without disclosing the first application, the party aggrieved may apply in a summary way for relief, and the court in which the second cause is depending, will at once extend it to him. *Wood vs. Bruce*, 215

20. But where the second application is not upon the same identical grounds as the first, the injunction granted upon the former, should not be dissolved without answer, or at all events, without notice to the complainant, - - - - - *Ib.*

21. Under the act of 1820, ch. 161, upon a bill filed on the 23d of June, 1835, if the *subpœna* is returned served to the then ensuing July term, and the defendant does not appear, an interlocutory decree may pass against him, and an *ex parte* commission issue to prove the allegations of the bill. *Grove vs. Fresh*, - - - - - - - - 280

22. Upon the return of the commission, the bill is not to be taken *pro confesso* against such defendant; though if there be also a non-resident defendant, against whom an order of publication has been passed, it is indispensable to a final decree that the bill should be taken *pro confesso*, as against the latter, the proof under the commission not being binding upon him, - - *Ib.*

23. Multifariousness in a bill must be taken advantage of by demurrer, *Ib.*

24. A decree which directs the payment of money, without actual or constructive proof of its receipt by the party directed to pay it, or of its loss by his negligence or misconduct, is erroneous, - - - *Ib.*

25. Upon a bill for an account, filed by one partner against his co-partners, after the termination of the partnership, all the parties are regarded as actors, and the decree must settle the partnership concerns as if each partner was a complainant, filing a bill against his co-partners, - - - - - - - - *Ib.*

26. The claims of the complainants and the defendants, and of the defendants, *inter se*, must all be determined, - - - - - - - - *Ib.*

27. *Quere.*—Whether a decree would be reversed, which merely settles the rights of the complainant and defendants, when the latter had not appeared in the court of chancery before the decree, and consequently filed no exceptions to the accounts of the auditor, upon which the decree was based, - - - *Ib.*

28. Under the act of 1832, ch. 302, the objection that evidence is derived from hearsay, must be taken by exception in the chancery court, and if not so taken in that court, cannot be made here. *Key vs. Knott and Wife*, - - - - 342

29. When application is made by a defendant in a court of law to the court of chancery, for relief against the judgment, upon facts, in relation to which the proof is contradictory, it is in the discretion of the chancery court to decide the facts, or send an issue to be tried in a court of law, - - - - - - *Ib.*

30. Under the act of 1835, ch. 346 and 380, an appeal will not lie from an order granting, or from the refusal to dissolve an injunction, until the defendant has filed his answer; and when an answer has been ruled insufficient upon exceptions, it is regarded as no answer. *Richter & Wheat vs. Pue and Wife*, - 475

PRACTICE.

1. When a reference is made of a depending suit, the act of 1785, ch. 80, sec. 11, requires the case to be continued; but the omission to enter the continuances is clerical merely, and this court can correct the error, without sending the record back to the county court. *Shriver vs. State, use Devilbiss*, - - - - - - 1

2. Upon a second appeal in the same case, this court may look into, and decide questions involved in the record previously brought up, when a decision of those questions was not made upon the former appeal. *Duvall vs. Farmers' Bank of Maryland*, - - - - - - - - 31

3. It is the uniform practice at law, where some of the issues are found for the plaintiff, and the others for the defendants, to allow costs to the party, in whose favour the final judgment is given, and such is the general rule in chancery. *Thomas vs. Frederick County School*, 115

4. An instruction, founded upon the hypothesis, that the jury may find that certain facts did not exist, of which there was no evidence, is

erroneous, as tending to mislead them in forming their verdict. *Powell et al, vs. Bradlee*, - 220
5. A writ of error, *coram nobis*, lies to correct an error *in fact*, in the same court, where the record is. *Hawkins vs. Bowie*, - - - 428
6. But an error *in law*, which is the default of the judges, the same court cannot correct, by writ of error, or without; such error should be redressed by another court, *Ib.*
7. The death of the plaintiff before the impetration of the writ, should be pleaded in abatement, - - *Ib.*
8. The rejection by the county court, of a plea that the plaintiff is, and was a slave at the time the single bill was given upon which the suit was brought, whether right or wrong, furnishes no ground upon which the same court could reverse its own judgment, by a proceeding in error, *coram nobis*, being, if an error at all, an error in law, *Ib.*
9. An appeal will lie, from the judgment of the county court, reversing upon error, *coram nobis*, their former judgment, and rendering judgment for costs, in favour of the party suing such writ, - - *Ib.*
10. The particular order in which a party chooses to establish the facts of his case, is a matter for his exclusive consideration. *Caton vs. Carter*, - - - - - - - - 476

PRIVATE PROPERTY TAKEN FOR THE PUBLIC USE.

1. It is settled in this state, that the power to take private property for public uses, upon making just compensation, may be exercised, for the benefit of the public, by individuals, or corporations, upon whom the legislature has conferred the power. *Tide Water Canal Co. vs. Ann Archer*, - - - - - - - 479

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. G, on the 17th of July, 1827, entered into the following agreement with the plaintiffs. "Whereas, I am endorser of three notes drawn by L, payable to R, and endorsed by R and myself, the first bearing date the 9th of May, 1827, payable at sixty days after date; the second bearing date the 1st of June, 1827, payable at ninety days after date; and the third, bearing date the 20th of June, 1827, payable sixty days after date. And whereas, at my request, the bank which holds the said notes have agreed not to protest the same, or to ask a renewal of them when they become due, I do hereby agree to dispense with all notice of the time of payment or of the non-payment of said notes, and to be answerable for the amount of said notes, although no such notice is given to me." The bank on the 17th of September, 1829, instituted a suit against G, to recover the amount of the two notes, dated the 9th of May, and the 20th of June, 1827, when it was *held*, 1st. That with reference to the note *not due* at the date of the agreement, both demand on the maker, and notice to the defendant, the endorser, were dispensed with. 2d. That with regard to the note which *was due*, notice was dispensed with, and that as to the latter, the agreement furnished inferential evidence for the jury of a demand, subject, however, to be rebutted by opposing evidence on the other side. *Duvall vs. Farmers' Bank of Maryland*, - - 31
2. Although the agreement of the 17th of July, was made under the impression that the bank, but for it, was under the usual obligation to make demand and give notice on both notes; yet it does not preclude the plaintiff from showing, by the acts and agreements of the parties anterior thereto, that he was under no obligation to do so, nor is that right denied him, from the circumstance of his having offered evidence that a demand was in fact made, - - - - - - - - - *Ib.*
3. The holder of a promissory note is not bound to demand payment of the maker, when the latter has transferred to his endorser all his property, to indemnify him against loss for his liability, and the endorser, in such circumstances, is responsible to the holder, though the demand is omitted, - - - - *Ib.*
4. But whenever an exemption from the necessity of proving a demand is claimed, the plaintiff must prove the facts necessary to make his case an exception to the general rule, *Ib.*
5. Where the maker of promissory notes gave to his endorsers a mortgage for their indemnity, with a

covenant to pay the responsibilities, at a period subsequent to the maturity of the notes; the effect of such covenant is, not only to prevent a foreclosure of the mortgage before the time stipulated, but all recovery against the maker, on account of the notes prior to that period, though the endorsers are compelled to pay the money earlier. And such covenant has the further effect, to render unnecessary to the responsibility of the endorsers, that the holder should demand payment of the maker, and give notice of dishonour to them, - - - - *Ib.*

6. If in such case, there is more than one endorser, and the mortgage is given to them all, demand and notice are not necessary to enable the succeeding to recover from the preceding endorsers, for the former could have no recourse to the latter until the time limited in the mortgage for the drawer's responsibility had elapsed, - - - - *Ib.*
7. The holder of negotiable paper, whose name is forged in the endorsation of it, does not lose his right to the money secured by it, and no title can be made through the medium of such forgery. *Key vs. Knott and Wife*, - - - - 342
8. The circumstances stated, which excused a party from the consequence of *laches*, who had received a bank post-note, the endorsement of which had been forged, when seeking reimbursement from the person of whom he had received it, *Ib.*
9. The rules in reference to demand and notice, applicable to promissory notes and bills of exchange, do not apply to the post-notes of a bank, - - - - - - - - - *Ib.*

REPLEVIN.

1. The principle is unquestionable, that property in the custody of the law, cannot be *replevied*; but where property had been first *replevied*, and there was evidence to show that the plaintiffs in that suit had waived the delivery of the possession to them under their writ, and it was then taken under a subsequent writ, the court will not instruct the jury, that the plaintiff cannot recover, if they find that such subsequent writ issued while the property was in the custody of the sheriff. *Powell et al, vs. Bradlee*, - - - - - - - - - 220
2. Whether two defendants can be sued jointly in *replevin*, for several parcels of property, severally owned, and separately taken and detained. *Quere*, - - - - - - *Ib.*
3. But the defect of such misjoinder, (if it be one,) may be cured, by putting the party to his election; or by the verdict of the jury, finding for the plaintiff on one count, and for the defendant on the other, *Ib.*
4. The party to whom by the terms of the bill of lading, the property is to be delivered, has the legal title, and is competent to maintain *replevin* therefor, - - - - - - - - *Ib.*
5. If *one* of the plaintiffs in a previous *replevin*, agrees to dispense with the actual delivery of the property taken under it, and to consider it delivered, so that the plaintiff in a subsequent *replevin* may take it as if the delivery under the first writ had been consummated, it is not competent for the plaintiffs in such first writ, to object that the property when taken under the second, was in *custodia legis*, - - - *Ib.*
6. But the objection that the property is in *custodia legis* may be made, unless there is an agreement, dispensing with the delivery prior to the execution of the second writ, although the defendants subsequently to its execution, may agree to waive the irregularity, and to ratify and confirm the proceedings of the sheriff, - - - - - - - *Ib.*

SALES OF PERSONAL PROPERTY.

1. The court will not instruct the jury, that a sale for cash, payable on delivery, passes no title in the property sold to the vendee, if the cash is neither paid or tendered, where there is evidence of an usage to deliver the property without demanding the cash at the time. *Powell et al, vs. Bradlee*, - 220
2. It does not follow that a sale is fraudulent and void, because the vendees at the time of the purchase are insolvent, and know themselves to be so, and did not communicate that circumstance to the vendors, who were ignorant thereof, and known to be ignorant by the vendees, - - - - - - - - - *Ib*

3. If a sale of goods be made for cash, the vendors may, by an unconditional delivery, without a concurrent demand of the money, waive the cash payment; and such delivery unaffected by fraud on the part of the vendees, would pass the property. But if a sale be made for cash, the purchaser will acquire no title without payment, unless that condition be waived by the vendor, *Ib.*

4. Where goods are sold upon terms of being paid for on delivery, and there is evidence of an usage in such cases, of delivering, without demanding the cash at the time; and the goods so sold are actually delivered without being paid for; it is proper that the court should leave it to the jury to say, whether the delivery was in reference to the usage, and no waiver of the cash payment; or without reference thereto, and unconditional, so as to pass the title, - - - - - - - - - *Ib.*

5. If parties purchase goods knowing themselves to be insolvent, and without any expectation of paying for them, and in circumstances which preclude the vendor, by ordinary prudence, from becoming acquainted with the facts, which are concealed from him by the purchaser, who shortly afterwards fails and applies for the benefit of the insolvent laws, the contract of sale is fraudulent and void, and passes no title, - - - - - *Ib.*

6. But if under such a sale, the goods are delivered to the purchaser, and he transfers them by bill of lading to a third party, who *bona fide*, and upon the faith of such transfer becomes his creditor, the title does pass to such third party, - - *Ib.*

7. In order to invalidate a sale upon the ground of fraud, it is not necessary that the jury should find, that the purchaser knew he would be unable to pay. It is sufficient, in that respect, that he should be found by the jury to be in insolvent circumstances, and had no reasonable expectation of paying for the goods purchased, - - - - - - *Ib.*

SHERIFF'S BOND.

1. Upon the demurrer to the plea of a special *non est factum*, filed in an action on a sheriff's bond, stating as the ground of such plea, that it was executed, and attested on the 18th of January, 1832, it was *held*, that although the bond had not been taken within the time limited by the act of 1794, ch. 54, sec. 8, as the bond of the sheriff *first* returned to the executive, according to the provisions of the constitution; yet that it might have been legally executed, and attested, as the bond of the *second* so returned, given upon the occurrence of either of the events provided for by the constitution of the state. And that therefore, as it may have been legally executed and attested, consistently with all the averments of the defendants' plea, the plaintiff's demurrer thereto ought to have been sustained. *State use Beall vs. Harrison, et al*, 15

SINGLE BILL.

See Consideration, 1.

SLAVES.

1. Slaves in this state cannot enter into valid contracts with their masters, nor can they appear as suitors in our courts of justice, legal or equitable. *Bland and Woolfolk vs. Dowling*, - - - - - - - - 19

2. If a negro slave, with the permission of his owner, takes up his residence in another state, and afterwards returns to this state, such owner cannot resume his property in him, either for the purpose of servitude within the state, or sale to a citizen of *Maryland*, even although the return of the negro *originally*, was against the owner's consent, - - - - - - - - *Ib.*

3. The using, or sale under such circumstances, would be equivalent to a sanction of his return, and an evasion of the act of 1786, ch. 67, prohibiting the importation of slaves, *Ib.*

4. When it appears by the inventory returned by an executor or administrator, that he is in possession of negro property belonging to the deceased he is properly chargeable with their hire, or the value of their services, unless he shows by proof, an adequate excuse for not having received such hire, or value. *Wilson vs. Negro Ann Barnett*, 158

5. And upon a petition for freedom, such charge is a proper item, in estimating the value of the deceased's

personal estate, exclusive of the negroes; when their right to freedom depends upon the assets being sufficient to pay debts, independently of them, - - - - - - *Ib.*

6. To enable the jury correctly to estimate the value of their services, it is sufficient to show by evidence the annual value of negroes of the same description as those mentioned in the inventory, - - - *Ib.*

7. When the right to freedom depends upon the sufficiency of the assets of the testator to pay debts, the inquiry is not limited to the condition of his estate at the period of his death. If the assets were sufficient at that time, but in a due course of administration, and before the executor's assent to the freedom, and without his fault, the estate, without the negroes become inadequate, the right to freedom would not exist, - *Ib.*

8. And so, if the assets are insufficient, at the testator's death, but by subsequent events, and in a due course of administration, they become sufficient, the claim to freedom could not be resisted, - *Ib.*

9. By the act 1823, ch. 87, the importer of slaves into this state from any of the United States, is not required in the list which he is to deliver to the clerk of the county, to state the manner in which he acquired his title. *Negro Peggy vs. Wilson,* 169

10. If all the other requisitions of the pre-existing laws are complied with, the list is complete, though the mode of acquiring the title is omitted, *Ib.*

11. Upon a petition filed by a slave, stating her right to freedom at a future time, and asking in the mean time, that the party in possession might be compelled to give security not to remove her from the state, accompanied with a suggestion that he was about to do so; it was *held* that the court had no power to interfere, and that upon demurrer or suggestion the petition would be dismissed. *Negro Harriet vs. Ridgely,* 174

12. Upon such a petition, the question of a petitioner's right to freedom is not presented; although the defendant in his answer tenders, and the petitioner joins issue upon that right, - - - - - - *Ib.*

13. An executor who has returned a slave in his inventory of the estate of his testator, is not therefore estopped from shewing, in resisting the slave's right to freedom, under the will of his testator, that he was the property of another, - - *Ib.*

14. Such inventory is not conclusive upon the executor, or any one else; upon proof of error, he may get credit in the orphan's court, or when called to account, by the creditors, or distributees of his testator, - - - - - - - - *Ib.*

15. When a petition is filed for freedom, the question to be tried, is the petitioner's right thereto; and not the right of the defendant to hold him in slavery, - - - - - *Ib.*

16. T, the owner of the petitioner, a female slave for life, on the 18th of May, 1832, executed and delivered to her a deed of manumission, which was duly acknowledged, but not recorded. T, subsequently, not being then in possession of the slave, sold and conveyed her by bill of sale, duly acknowledged and recorded to a purchaser, having knowledge at the time of the deed of manumission. This purchaser afterwards sold her to R, to whom on the 2d of May, 1833, he executed and delivered a bill of sale, which was acknowledged and recorded according to law. *Negro Anna Maria vs. Rogers,* - - 181

17. The legislature, at December session, 1834, ch. 95, passed a law, authorizing the recording of the deed of manumission; and providing that the same when recorded, should be as valid and effectual for every purpose, as if it had been duly recorded within the time required by law. After the deed had been recorded under this law, the appellant, the negro therein mentioned, filed her petition for freedom, but the judgment of the county court in opposition to her title, was affirmed on appeal to this court, - - *Ib.*

18. Declarations made by the owner of slaves, when about to remove with them from this state, and when making preparations for that purpose, are admissable evidence, upon a petition filed by such slaves against the owner for freedom, to shew the place to which the owner intended to remove; though the petitioners had offered no evidence of his declarations made at the same

time and place. *Cross et al, vs. Black,* - - - - - - - - 198
19. As a general rule, the verdict upon a petition for freedom, being freedom *vel non*, must be for the defendant, unless a title to freedom is made out by the petitioner, - *Ib.*
20. It was not the design of the act of 1831, ch. 323, to restrict, in any manner, the acknowledged rights of masters in reference to slaves residing in this state, nor to prevent their being taken or sent out of the state, to travel or sojourn, for mere temporary purposes, - - - *Ib.*
21. A citizen of *Maryland* intending to break up his establishment, and leaving this state with his slaves, with the avowed design of becoming a resident of another state, and actually going out of the state in pursuance of such design, may, before he reaches the point of his intended destination, change his purpose, and return with his slaves, without forfeiting his title to them; to subject him to such forfeiture, there must be an actual consummated design, to remove and place them elsewhere permanently, - *Ib.*

SUBSCRIBERS TO STOCK.

See Corporation, 37, 38.

TRUSTEE AND CESTUI QUE TRUST.

1. When two are appointed trustees and executors of a will, and one of them renounces, he cannot be made chargeable with a breach of the trust by the other—no proof being adduced that the renouncing party ever received any portion of the trust fund. *Hall vs. Clagett and Hill,* - - - - - - - - - 80
2. When the proceeds of a trust estate are enjoined in the hands of an agent of the trustee appointed to collect, and both principal and agent called upon to bring the money into court, the principal is not ordinarily bound to pay interest during the continuance of the injunction, - - - - - - - - - *Ib.*
3. A trustee acting improperly with trust funds may be compelled to bring them into court before the time at which, under other circumstances, he would be bound to pay them to the *c. q. t.* - - - *Ib.*
4. A party who sells property and receives the proceeds thereof as the agent of another, who held the same in trust, is liable to said trustee, in an action for money had and received, notwithstanding the *cestui que trust* knew of, and consented to the sale. *Chapman vs. Morris,* - 101
5. The mere circumstance of the *cestui que trust* knowing of and consenting to the sale, would not release the trustee from his responsibility to the *cestui que trust,* *Ib.*
6. To accomplish that, it would be necessary to show, that the latter consented to look to the party who made the sale, for the proceeds of the property, - - - - - *Ib.*
7. And in a suit by a trustee under such circumstances, his right to recover does not depend upon his having made advances to his *cestui que trust*, upon the faith of the trust fund, - - - - - - *Ib.*

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